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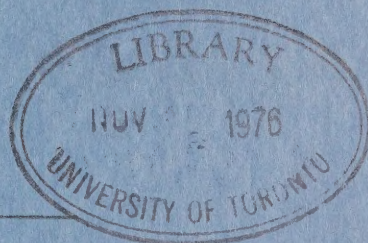
M E E T I N G

held at

The Frost Building, Queen's Park, Toronto

on

FRIDAY, NOVEMBER 29, 1968



VERBATIM REPORT OF PROCEEDINGS

ONTARIO ADVISORY COMMITTEE ON CONFEDERATION

Meeting held in the Board Room, 6th Floor,
The Frost Building, Queen's Park, Toronto,
on Friday, November 29, 1968.

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PRESENT

Mr. I. N. Macdonald (Chairman)

Prof. A. Brady MEETING

Prof. J. Conway

held at

Dr. A. Ferrel

The Frost Building, Queen's Park, Toronto

Mr. J. H. Gathergole

on

Rev. Dr. L. Matte

Prof. J. FRIDAY, NOVEMBER 29, 1968

Prof. E. McWhinney

Mr. J. H. Perry

Prof. T. B. R. Symons

In attendance for part of

Mr. A. B. Dick, M.P., Deputy

Mr. J. H. Gathergole

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Mr. I.M. Macdonald (Chairman)

Prof. A. Brady

Prof. J. Conway

Dr. E. Forsey

Prof. P.W. Fox

Mr. G.E. Gathercole

Rev. Dr. L. Matte

Prof. J. Meisel

Prof. E. McWhinney

Mr. J.H. Perry

Prof. T.H. B. Symons

In attendance for part of morning session:-

Mr. A.R. Dick, Q.C., Deputy Attorney General

Mr. D.W. Stevenson)

) Co-Secretaries

Mr. R.A. Farrell)

Mr. E. Greathed)

Mr. C. Beer)

) Secretariat

Mr. G. Posen)

Mr. D. Hobbs)

--- At 9:40 a.m.

THE CHAIRMAN: Gentlemen, we might begin the meeting today. I would report on the status of attendants or non-attendants. We have regrets today from Messrs. Seguin, Creighton, Lederman and Gathercole.

I also have to report, with regret, two resignations from the Committee, which brings the total number of departures to three from the time the Committee began in February 1965, when we had eighteen members of the Committee. Mr. Justice Laskin left us in that year, as you recall. Then a few weeks ago I had a letter from Cliff Magone, saying that his health was really not up to his carrying on with the Committee, and with great regret he asked to be relieved of those responsibilities. I have written to him on behalf of the Committee, as has the Prime Minister.

Then just two days ago Dean Dillon, who has since become involved in a number of other obligations, both internal and external to the university, has found that his time has been imposed upon further and he, with great regret, asked to be relieved from the Committee. He also asked me to convey to the Committee how very much he had enjoyed his

participation, and how much he had appreciated the fellowship and the work that he had been privileged to participate in.

That reduced our number to fifteen. As you know, for this current academic, autumn term, Professor McIvor is in the United Kingdom, but will return to us in the New Year.

I would also like to welcome the Deputy Attorney-General, who is kindly joining us for this morning. He and I, as you know, are the two Ontario delegates to the Continuing Committee of Officials, and I think we are perhaps both going through an interesting transition in the direction in which our thoughts have been moving.

MR. DICK: It is a very apt description of what I am doing.

THE CHAIRMAN: As a result, in that Committee, we may end up in the same position in which the other person began. I don't mean position in terms of responsibilities within the Ontario Government, I trust.

MR. DICK: Our attitude towards the developments.

PROF. McWHINNEY: Will you later explain to us the present position and the previous position?

THE CHAIRMAN: I think it may evolve during the course of the day.

I think Mr. Greathed would like to introduce a new member of his staff in the Secretariat.

MR. GREATHED: Mr. Chairman, I just introduce to the members Mr. David Hobbs, sitting over by Gary there. David comes to us from the University of Toronto and from Yale, and most recently has spent a year teaching at Neuchatel. We welcome him very much to the staff. He is going to be working in the cultural and educational side with Charles Beer and Coleen Malone.

THE CHAIRMAN: Could the staff explain why we are on candid microphone, as the expression goes?

MR. GREATHED: Yes. Some time ago Mr. Pettat asked whether he might have this microphone here to put some of the proceedings on tape, because sometimes he does not pick up every word that the members say.

THE CHAIRMAN: In this day and age these devices are sometimes intimidating or disconcerting, and I thought I might just enquire if any of the Committee ---

DR. FORSEY: Perhaps we should have the Deputy Attorney-General inform us of our rights.
(Laughter)

MR. DICK: Can't very well. I just

started my recorder.

THE CHAIRMAN: The Prime Minister is very much hoping to join us briefly at some time this afternoon. He is sandwiched between festivities that are associated, on the one hand, with the Grey Cup Festival, and, on the other hand, with the one hundred and fiftieth anniversary of the birth of George Brown. So he is trying to extend his activities over a wide sweep of history today. There are celebrations this morning which we shall undoubtedly hear about 11 o'clock, coming in through the windows. He would very much like to have a brief informal chat with you this afternoon if time permits, to get your views on current developments.

PROF. McWHINNEY: What time roughly, do you expect?

THE CHAIRMAN: I think it would be probably 2 o'clock.

PROF. McWHINNEY: But it would be before, say, 3:30 or 4?

THE CHAIRMAN: Yes. His hope is to come right from lunch, and it would be around 2 o'clock.

Are there any questions on the procedural front, or can we move on to the agenda?

Item 2 is the report on the meetings of

the Continuing Committee of Officials, and I ask Mr. Stevenson, Mr. Greathed and Mr. Dick if they wish to make any observations on the work of the Committee.

So far the Continuing Committee of Officials has met four times, in May, July, September and November. It will meet again for three days next week, which will be the fifth and final meeting before the prime ministerial meeting in the week beginning December 16th.

I think the Committee, if nothing else, is setting a new record for the transmission of paper, which is something of an achievement in this day and age.

I might ask Don or you, Ed, if you would like to report in greater detail on the actual working operations.

MR. STEVENSON: Maybe I can take it into one more desegregation in detail and Ed can take it further, or Rendell.

Since we last met, of course, there was a very short meeting interrupted by the death of Premier Johnson, at the end of September. That meeting got the Continuing Committee nicely into some of the discussion on the basic objects of confederation, centred around two or three propositions sent in by the Government of

Quebec, the Government of Ontario and the Federal Government. This subject was taken up again in the meeting of the Continuing Committee, November 7th, 8th and 9th, by which time a number of other provinces had entered into the proposition-preparing phase. We now have, I think, all provinces except two who have prepared and submitted to the Committee propositions on some of the nine major classifications for constitutional review.

THE CHAIRMAN: That is Prince Edward Island and British Columbia?

MR. GREATHED: Manitoba.

MR. STEVENSON: Prince Edward Island and Manitoba have none. British Columbia have two propositions which really cannot be called propositions.

THE CHAIRMAN: And one which appeared in the newspaper.

MR. STEVENSON: Excerpts from one of Mr. Bennett's speeches.

THE CHAIRMAN: One additional one from the newspaper yesterday.

MR. STEVENSON: Right. Just before the November meeting we received ten or eleven propositions from Alberta, all of which I think are obviously pretty well direct from the Premier himself. They related mostly to the question of

entrenchment of fundamental rights and the position taken pretty strongly against, and also entrenchment of language rights with much the same basic tenor, also very much against any guarantees, legislative or constitutional, of language rights.

I think somewhat the same can be said for some of the propositions which came from Saskatchewan for the first time for our November meeting.

The Federal Government added a number of propositions of its own. It withdrew a proposition it had previously presented on the Bill of Rights, and it presented in its stead a more detailed set of propositions. I guess that accounted for the new one since the last meeting.

The discussion on November 7th, 8th and 9th centred around a draft report which will be discussed again in our meetings next week in Ottawa, which will be presented by the Committee to the Premiers and Prime Ministers at their meeting on December 16th; also a report of the Official Languages Sub-Committee on which Charles Beer sits for Ontario. I think he might tell us a little more about that later.

Then on the classification for review of the basic objects of confederation, the question of fundamental rights, I suppose, took

up a day and a half of the three days.

Rendell Dick can report more fully on that, but we found it a most stimulating discussion, with viewpoints on both sides of the question being expressed very cogently.

By the end of the meeting we had got ourselves into the constitution of the central government, but I think only on the fringes. We expect that next week there will be some discussion on the Senate, the Supreme Court, and on at least the principles to be followed in a discussion of the distribution of powers.

I think that covers it as far as a description of what happened, without going to anything of the flavour. Ed, what did I miss?

MR. GREATHED: I don't think I have anything to add to that, Mr. Chairman. There is one point I might just make to which Don referred indirectly.

The Sub-Committee on Official Languages, which is the only sub-committee which is being struck by the Continuing Committee of Officials has met twice now, once in July and once in October and, as Don said, our representatives on that Committee are Mr. Beer and Mr. Omand, who is the Executive Director of Personnel and Development in the Department of the Civil Service and whose responsibilities encompass

the French language training programme within this Government.

THE CHAIRMAN: Do you want to add anything on this, Charles?

MR. BEER: I don't think there is a great deal to add. At the November 1st meeting of the Cultural and Educational Sub-Committee we discussed briefly some of the points arising out of the Sub-Committee on Official Languages, and in Professor Brady's report he will touch on some of these things.

Perhaps the only major point to make is that I think it is obvious now that on the consensus of language rights there will be a certain amount of difficulty in getting national agreement from all the provinces, and that this is perhaps the most serious problem that faces the Sub-Committee on the issue of language rights, and I think there is going to be perhaps a movement towards looking at individual cases and trying to solve problems more on the basis of the way Ontario has been approaching it, trying to isolate certain problems, such as education, civil affairs and what-have-you, rather than trying to hammer out at the present time an agreement on the more fundamental acceptance of language rights.

PROF: SYMONS: Mr. Chairman, has

there been any progress or is there anything to report on work on the national capital?

THE CHAIRMAN: I think I might ask Mr. Stevenson, who is one of three Ontario representatives on that inter-governmental committee, to comment on that.

MR. STEVENSON: I think we were meeting in September on the same day that the Advisory Committee last met. At that time the representatives of three governments agreed on a preliminary report to their prime ministers. They recommended the basic structure of a tripartite organization which would be concerned with the future development of the capital region. This report went to the three prime ministers. They are each considering it. There have been a number of telephone conversations between capitals since then. The prime ministers themselves may be meeting on it during the constitutional conference. I am not sure whether they will have an opportunity to get together on it before that, but certainly we hope that they will arrive at a decision fairly soon; so that when the Ottawa-Carleton regional government comes into effect in Ontario on January 1st it can be fitted into the framework which is agreed on for the capital area as a whole, though unfortunately we

are not quite sure yet what the final outcome will be.

In the meantime the Quebec cabinet has discussed the Dorion Report on the integrity of Quebec's territory, and I gather that it takes a view which goes against some of the recommendations in our report, which I am sure is creating some problem down in Quebec City now.

PROF. SYMONS: Just one more question on that, if I may. How will Professor Rowat's research and report fit into this? It sounds to me as though the work he is going to be able to do on that may really come after the decisions have been pretty substantially reached.

MR. STEVENSON: I think essentially we have released Professor Rowat from his commitments, because he felt that he would not be able to come up in any short period with research that would be directly applicable to what we were doing. In the meantime he was giving to this other commission on students, universities, and we felt -- and he felt -- that he probably could not do us justice in that other area.

PROF. SYMONS: Thank you.

THE CHAIRMAN: As I say, we will be meeting again next week to go over what is a very, very interesting but what appears to be a never-ending task, of sorting out all these

propositions and discussing all the implications.

I think the future work of the Continuing Committee of Officials will be very much guided by the character of the December Constitutional Conference and also instructions, of course, that come back to the Committee from that meeting.

My own view of the Continuing Committee of Officials is that we should be working on fairly quickly to some committee work where we can get down to more specific matters and away from some of the general considerations.

PROF. McWHINNEY: Are you getting -- what are you going to call it? -- an officials' concensus; do you detect what I would call a professional census emerging in the Continuing Committee of Officials on certain subjects; or are you in fact getting really reflections of individual governments' positions, the governments to which the officials belong?

THE CHAIRMAN: I would say it is more the latter. I think the road to harmonization is still a lengthy one.

MR. DICK: A long one. I was going to say, Mr. Chairman, when you mentioned, to my mind they are entirely government positions. The one that bothered me more than anything else in the way of presentation is the submission of the Federal Government of the proposition on the Charter of Human Rights, Bill of Rights, and

so on, in which the Federal proposition is completely repudiated by our own Prime Minister, as stated at the prime ministers' conference in February where he had indicated a gradually developing approach, and where the Federal Government in its stone-headed way just went entirely the other way and injected into their propositions everything they had originally said with a complete disregard for what had been said at the prime ministers' conference.

I think perhaps the provinces, or many of them, have adopted somewhat the same attitude: they are stating positions they have already indicated, and very strong and what appear to be rather determined positions on things such as the entrenchment of linguistic rights, as from the Western Provinces.

PROF. McWHINNEY: It is really in a way then simply a reproduction, perhaps in technically more scientific language or technically more sophisticated language, of the confrontation of the heads of governments at the open, televised conferences.

MR. DICK: It appeared that way to me, certainly from the Federal proposition.

PROF. McWHINNEY: I think what would have interested us in our professional capacity is if there had been a trend the

other way, that the officials representing the technical expertise had found common ground perhaps transcending the governments' positions.

MR. DICK: We volunteered in the matter of Bill of Rights, for instance -- and I turned Ian's hair grey in having taken major strides from my original Magna Carta position.

PROF. McWHINNEY: You have been seeing Paul Martin's barber, I can see.

MR. DICK: And suggested, you know, modifications from the Federal position with respect to an entrenched Bill of Rights on certain aspects, at the suggestion of our own Prime Minister, to see if there were some middle ground in here; but I did not see anything volunteered from any other province or the Federal Government which indicated that type of thing.

MR. STEVENSON: We might say, Mr. Chairman, that what has bothered us most in the discussions so far has been that there is this very tendency to repeat the already-announced statements of political leaders.

Two or three of the provinces have been making a determined effort to get the officials' meetings into a much more seminar style of discussion format, whereby provinces do not take firm stands.

The Province of New Brunswick, for

instance, sent in quite a mass of propositions before our very first meeting, which obviously had not been fully cleared through their own government; and they are quite concerned now because they had regarded these propositions as their tentative offering to a discussion, and they find from some of the other governments, particularly the Federal Government, nothing is put forward until it has been fully cleared by Cabinet, and it looks as if it is taking on a much more rigid position.

So one of our major contributions, I think, has been to attempt to get it back into a give-and-take operation. We withdrew most of our propositions and replaced them by other ones before the September meeting, as an indication of how our own positions were not that rigid.

PROF. McWHINNEY: Maybe it is a wrong interpretation, but I felt -- what would one call it? -- a more conservative approach became evident in this latest group of propositions than what I had felt was evident in either of the earlier papers or discussions. I assume this was in response to the give-and-take you mention.

THE CHAIRMAN: I think there are two quite sharp procedural problems and differences of opinion procedurally, and Don has mentioned one: a difference between the view of those who wished to say that the task of this Committee

is not to negotiate positions already taken on behalf of their governments, but rather to search out together in a collective manner what kind of changes would be appropriate, and then go about our various tasks in our governments by way of advising and working with our political leaders to try and assist them in moving to some consensus positions, which would then emerge at the full conference.

This, however, is not universally accepted, and I have been quite concerned that we are moving back into the same old business where you are going to get action and reaction to firm, stated positions, rather than working up to some sets of options upon which the political people can then negotiate.

The second procedural difference is very strong, and I think that is the consideration about the appropriate order in which these matters should be treated. There are just very different opinions about what is the appropriate order for the treatment of the various subjects.

For example, the Federal Government has committed itself very strongly to this view that it should deal first with entrenchment of rights and with language questions, and then go on to institutions, and finally come to distribution of powers.

Other provinces, including our own, have taken a variation on that approach, not necessarily that one should do other things first and other things second, but rather that we should be working on all fronts simultaneously, particularly through sub-committee structures, that will bring out some possible inconsistencies; pointing out that your attitude, a government's attitude, a provincial premier's attitude on an entrenched Bill of Rights might be very, very different depending upon what were to happen or what were likely to happen in a number of other areas of constitutional revision.

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So that my own concern through/has been to maintain this organization as flexibly and as openly as possible; and I have been more than once quite concerned about the little pattern of rigidity descending upon discussion. I think if that is going to be true at the level of officials, it is going to be a fortiori true at the level of the prime ministers, but we shall see.

PROF. McWHINNEY: I think perhaps this discussion is interesting from the scientific viewpoint of political science and the lawyers -- the effect, if you wish, of what Max Weber used to call the special skill groups' contribution of their own technique, having an influence on development of substantive ideas.

When you mentioned the New Brunswick delegation, for example, I think I made the comment last day that the New Brunswick delegation really was not a group of officials; you had the publicists mixed up with the officials.

On the other hand, if the officials are likely just going to express government positions and cannot get beyond this, it may well be that this is the best use of your time as officials. It may be that one should have the confrontation of the heads of State, the Government.

THE CHAIRMAN: Maybe.

MR. DICK: Mr. Chairman, I wonder if I might leave this arena. We have collective bargaining going on with the Government upstairs, and we are considering the union's submission on a fringe benefit package, and I have to go up and protect our interests there for a short while.

THE CHAIRMAN: While I think of it, would you give my apologies to Carl Brannan? I was invited up there.

MR. DICK: I will carry both our bags up there.

THE CHAIRMAN: I think we have a common interest in that matter.

MR. DICK: You are right. The only thing that appeals to me is that six weeks holiday.
(Laughter)

PROF. McWHINNEY: We will have the

20.
opportunity of hearing Rendall on the Bill of Rights issue.

THE CHAIRMAN: Yes, he will be back. He is talking about Civil Service rights, right now.

MR. STEVENSON: Fundamental rights.

THE CHAIRMAN: Perhaps we might go on to Item 3. I realize how hard everyone has been working in the sub-committees and task forces of this Advisory Committee, and how much time has been spent, and how much good work has been coming forward.

As I mentioned before, now we are right into the business of dealing with constitutional change and other matters, and this is really the place where the contribution of this Committee, I think, will be most apparent.

There are two areas that have been particularly active in recent weeks -- the Cultural and Educational Sub-Committee, and the Distribution of Powers Task Force. I believe there are matters that should be reported upon and should be carried forward from this Committee now at this stage.

Professor Brady, are you going to report on the first item, if you would?

PROF. BRADY: Yes. The Cultural Sub-Committee and the Task Force on Biculturalism

and Bilingualism held a joint meeting on November 1st. It was thought it would be well, since both of these Committees actually were interested in much the same thing, for them to meet together and to review developments in cultural and educational affairs since last spring when there were meetings of both of those Committees, at that time separately.

We have a full agenda this morning, and I shall not attempt to describe all the matters discussed.

There was a review of what occurred during the last four or five months, interesting things. The most important event in the meeting was the discussion for more than two hours with Professor Rathé, the director of the cultural and educational exchange programme." He outlined, interestingly, all that had been attempted under his direction since he took the office about two years ago, and what his experience had been.

As the result of his experience he had one major recommendation which he strongly urged, and which the joint committee discussed in detail, namely, the need for a formal cultural agreement or accord between Quebec and Ontario; to be extended to other provinces, but the initial action to be taken to have this accord between Ontario and Quebec.

Professor Rathé illustrated in a practical

way how the absence of such an accord -- which incidentally was originally recommended by President Symons in his report in the spring of 1965 -- how its absence was sometimes a source of much embarrassment to officials and individuals connected with the exchange programme, and how his own activity was not always as easy as it might be if there had been an accord.

As a result of the discussion with Professor Rathé, members of the joint committee instructed me, as chairman, to write you stating that they strongly recommended the conclusion of such an agreement at the earliest possible date, and that you would, we hope, convey this view to the Prime Minister. I have the letter in question which I shall submit to you now, Mr. Chairman. If you would like me to read any of it, I shall do so.

THE CHAIRMAN: I think it might be of interest, Professor Brady, if you care to. It is not too long?

PROF. BRADY: Two and a half pages long, but I think the first paragraph probably I can drop since it refers to this joint meeting that I have just described.

" We believe that such an agreement,
 "signed by the Prime Ministers of
 "Ontario and Quebec, should be entered
 "into as soon as possible.

" You will recall that at its
"meeting of April 30, 1965, the
"Advisory Committee asked President
"Symons to prepare a paper on this
"question. The arguments and
"proposals set forth by President
"Symons in his report are as valid
"today as in 1965. In part, he wrote:
" 'It would be appropriate for
" 'the initial approach to the
" 'Quebec Government for a
" 'cultural and educational
" 'exchange agreement to be
" 'made at the highest level, and
" 'it is desirable that this
" 'official approach be made as
" 'soon as possible.
" 'The implications of the form
" 'and procedure of an agreement
" 'between the two provinces for
" 'an exchange program should
" 'receive careful study. A
" 'signed agreement in the form of
" 'an entente or cultural accord
" 'might provide a framework within
" 'which further discussion and
" 'specific negotiations could
" 'take place. This accord might:
" '(a) constitute a broad

" ' agreement between Ontario
 " ' Quebec to initiate and
 " ' work together upon a
 " ' reciprocal program of
 " ' cultural and educational
 " ' exchanges;
 " ' (b) include specific provision
 " ' for establishing a joint
 " ' Ontario-Quebec Committee on
 " ' which the bodies entrusted
 " ' by each province with the
 " ' responsibility for conduct-
 " ' ing its exchange program
 " ' would be represented.
 " ' This joint committee could
 " ' act as a consultative body,
 " ' and serve as a sounding
 " ' board for ideas, and a
 " ' clearing house for the
 " ' various projects;
 " ' (c) provide for the establishment,
 " ' when appropriate, of a number
 " ' of other joint working
 " ' committees to deal with
 " ' specific matters.
 " 'The signing of such an agreement
 " 'or accord between the two provinces
 " 'would lend weight and significance
 " 'to the exchange program and would

" 'give to it an enhanced initial
 " 'impact as well as widespread
 " 'publicity.'"

That is the end of the quotation from President Symon's report. Incidentally, every word of that has been forcibly demonstrated by what has occurred since it was written.

" Much work has been accomplished by
 "Professor Rathé, the Director of the
 "Educational and Cultural Exchange
 "Program, in his two years with the
 "Department of Education. He has helped
 "to develop exchange programs in drama,
 "music, the visual and other arts.
 "Important steps have been taken in the
 "area of student and teacher exchanges.
 "Nonetheless, the lack of an official
 "agreement between Ontario and Quebec
 "has meant that the development of an
 "organized and sustained exchange pro-
 "gram has been seriously limited.

" Since our report was presented in
 "1965 several new factors have been
 "added to the situation. In the past
 "year, the Confederation of Tomorrow
 "Conference, the Report of the Royal
 "Commission on Bilingualism and
 "Biculturalism, the Constitutional
 "Conference of Premiers and Prime

"Ministers, have all served to quicken
"the progress of bilingualism both in
"Ontario and in certain other provinces.
"Yet this progress has not been
"uniform throughout the country.

" The momentum gained in the field
"of bilingualism over the past year
"must not be allowed to slacken,
"especially in view of the advocacy
"of unilingualism by certain groups
"in Quebec. An Ontario-Quebec
"cultural and educational agreement
"would not only emphasize the rights
"of the French-speaking minority in
"Ontario, but also those of the
"English-speaking minority in Quebec,
"until such time as linguistic rights
"can be more formally protected
"throughout the country. For this
"reason we urge the speedy conclusion of
"a cultural agreement.

" We believe that certain basic
"principles, covering the use of
"English and French in the Ontario and
"Quebec educational systems and in
"their administrations, should be
"clearly stated in the agreement. In
"addition, the agreement would be
"considerably strengthened if it stated

"that the two provinces should give
"official recognition to the English
"and French languages, while they
"recognised that English is the
"majority language of Ontario and
"French is the majority language of
"Quebec. The provision of bilingual
"services would then be made wherever
"a sufficient number of the official
"language minority would so warrant.

" The rest of the accord could
"follow the traditional pattern of
"other such agreements, e.g., Canada-
"France, Quebec-France. In his
"report, President Symons pointed out
"many areas in which exchanges could
"be developed. The many programs
"which Professor Rathé has initiated
"would also fall within the scope of
"the agreement.

" In conclusion, we believe that
"an official agreement would forge
"important links between the two
"provinces. It would serve as a
"vehicle to bring together people of all
"ages from Ontario and Quebec, and it
"would make them aware of the artistic
"creativity which exists in the two
"provinces. These reasons, coupled
"with the additional arguments we have

"outlined, clearly indicate that the
 "need for an agreement now is timely
 "and pressing.

" I am taking the liberty of
 "sending a copy of this letter to each
 "member of the Sub-Committee and of
 "the Task Force."

I have used the collective term "we"
 throughout this letter. Colleagues on the
 joint committee, of course, did not see the draft,
 and I hope that they do not find anything
 contradictory to their ideas in it.

I think, Mr. Chairman, that is really
 the report of this Committee.

THE CHAIRMAN: Thank you very much.
 That recommendation will certainly go forward.

I might say that both between Mr. Robarts
 and Mr. Bertrand and between the respective
 officials in the two governments, there have
 been discussions in the last few weeks on this
 very subject, and in fact to the point where
 there have been draft agreements exchanged.

I think it might not be inappropriate,
 if the Prime Minister comes this afternoon, if
 there is an opportunity, to have some preliminary
 discussion about that. We might as well seize
 the opportunity if it is there.

In any event, I shall put this forward
 with the recommendation. I imagine you would

like to have this recommendation go forward with the full support of this Committee, Professor Brady, this morning?

PROF. BRADY: Yes, indeed.

THE CHAIRMAN: So that I might open it to discussion within this Committee, if there are other matters of support or dissent.

PROF. FOX: Speaking as one of the members of the Sub-Committee who has not seen the letter that Professor Brady has just read, I would like to express complete agreement with what he said.

I think it also represents the unanimous opinion of our joint group, the cultural group and the Task Force, and I think he has put it admirably.

The only thing I would add is that since we met there have been accounts in the Press of the possibility of Quebec entering into a cultural agreement of a nature similar to this with Louisiana. I think it would be a great pity if Quebec were to enter into an agreement with Louisiana before Ontario and Quebec had agreed to some such accord.

THE CHAIRMAN: Do you think we might perhaps have a tripartite agreement?

PROF. FOX: It is a nice place to be in the winter, perhaps, but I just think somehow it is regrettable that we cannot have an accord

between two provinces which have so much in common, before one of the provinces has an agreement with a far distant state.

MR. GREATHED: I might say, as Professor Fox perhaps knows, the draft of that agreement has been in the books for some years.

PROF. McWHINNEY: Which one?

MR. GREATHED: Louisiana.

PROF. McWHINNEY: Exchanges have been taking place for at least two winters.

MR. GREATHED: Yes.

PROF. McWHINNEY: I think, as our Chairman indicated, this is a big factor.

THE CHAIRMAN: I suppose Louisiana has had fewer financial problems than the other prominent French-speaking community off-shore. It may be a shift of interest going on.

PROF. McWHINNEY: I know McGill, University of Montreal, and Laval professors seem to want to go down sometime between December and January to New Orleans and have been for several years.

THE CHAIRMAN: I wonder, perhaps one should deal with one thing at a time, and the obvious place to begin, I think, is to conclude this between Ontario and Quebec. We have had some discussion with Quebec officials about looking to the future a bit in terms of broadening this to include other provinces,

notably New Brunswick which has both a practical and a political advantage in participation here, I would think. Had you discussed this at all, Professor Brady, this aspect of it?

PROF. BRADY: Well, we certainly touched on that matter in the discussion, and we thought it would be excellent to have an agreement with New Brunswick; but that the first and most urgent will be to get an agreement with Quebec, and it perhaps might be indicated to New Brunswick in some manner that would be best, that such an accord might be also concluded with it.

PROF. McWHINNEY: Are we thinking of a bilateral agreement between Quebec and Ontario serving as a model for subsequent bilateral agreement, say, Ontario, New Brunswick, Alberta, Quebec, for example?

PROF. BRADY: Yes.

PROF. McWHINNEY: Rather than what I thought the Chairman was implying, some sort of tripartite agreement.

PROF. BRADY: Tripartite, yes.

PROF. McWHINNEY: The latter is the more difficult.

PROF. BRADY: It is more difficult; that is why I personally rather hesitate about waiting, as you would have to, the time. I think we should act about Quebec and then

perhaps go on from there.

PROF. McWHINNEY: We could perhaps proceed in the bilateral way, but indicating your hope that this might serve as a model agreement for similar bilateral arrangements between other provinces. That would be certainly constitutionally the simplest way. The other, though, requires a restructuring, the tripartite kind of idea.

MR. GREATHED: Mr. Chairman, both Professor McWhinney and Professor Brady have referred to the difficulties of this multi-lateral approach. Would you expand on that a bit? I am not quite sure what the difficulty is.

PROF. BRADY: There are more people involved, after all.

MR. GREATHED: Yes.

PROF. McWHINNEY: You have got to get a triple concensus. You can agree to exchange ten Ontario professors or secondary school teachers with ten Quebec ones; but it is the difference between a bilateral and multi-lateral treaty. The easiest treaties to make are ones between the Russians and U.S. The hardest ones are when you get a hundred countries, or three or four.

MR. GREATHED: It is a matter of timing rather than technique.

PROF. McWHINNEY: It is really a problem of getting political concensus; and to get your political concensus you usually have to make your agreement more waffling, vaguer, less concrete and less precise.

I think the better arrangement, speaking really as an international lawyer, is to adopt a bilateral agreement with people where the concensus exists, and simply try to make that a model (with or without minor modifications) for further bilateral agreement. In fact, you can get the same result by putting together half a dozen or a dozen bilateral agreements. It is easier operationally, there is not any question of that.

PROF. BRADY: I think as a matter of fact that New Brunswick is a different province really from Quebec in the type of society and so on. I am not sure, I am ignorant of this, and we did not discuss this with Professor Rathe; but I am inclined to think, you know, that really the problem of determining what kind of exchange you can have would be a little more difficult.

REV. FATHER MATTE: The first step is to have an accord between Quebec and Ontario, and the others will follow afterwards, I imagine.

PROF. SYMONS: I would support this too,

if I may, Mr. Chairman. I think I would agree with what Father Matte, Professor McWhinney and Professor Brady have said.

I think the main thing now, and it is more timely than ever and has always been timely, is to get the Ontario-Quebec accord or some kind of understanding on this. It might be a good idea to do as Professor Brady suggests -- and I think the suggestion is in the original report -- either in an announcement at the time of the signing of the accord or in the accord itself, indicate that this might perhaps serve as encouragement or an example to similar arrangements between other provinces or groups of provinces. I think this was the phrase that we used in the report, and the thought there was the possibility of something involving New Brunswick on the one hand and Manitoba on the other.

If I may, Mr. Chairman, I would like to say simply that I welcome Professor Brady's letter; I think it is a splendid letter.

DR. FORSEY: Hear, hear!

PROF. SYMONS: I felt that this was something that was desirable three years ago. I think in fact a great deal of it has been done, but I think that the formal step is now as desirable or more desirable than ever, and I

hope this might go forward with the support of our Advisory Committee.

DR. FORSEY: Mr. Chairman, may I endorse heartily what has been said all around by everybody, especially about the tripartite or multilateral agreement. I think the difficulties there would be very considerable, if only because New Brunswick is a very small province, has a relatively small core of officials to the best of my belief, and will probably have much less to offer in exchange (I mean in amount) with Quebec. I should think that the whole thing would be a very different set of special circumstances; and while obviously it is not desirable to give the impression that Ontario and Quebec are going to erect some kind of wall around themselves, and say, "This means us and you keep out", sort of thing, nevertheless I think if you sit down and try to work out a tripartite agreement you will run into not only the difficulties that have already been stated by Professor Brady and Professor McWhinney, but also sheer difficulties of size and special circumstances including, for example, the fact that New Brunswick has a very much larger French-speaking minority than Ontario has, and that the whole balance of forces there is quite different. You have a cabinet which is about half French-speaking, and a variety of

things. You can start listing the differences between Ontario and New Brunswick, and you could go on for three-quarters of an hour and not come to an end.

PROF. McWHINNEY: I think, just echoing, this sort of really wraps the point up.

I remember in my specialty, when working at a particular problem where there was a failure to get a multilateral agreement in an air convention, and there could not be any concensus; so the United States and Great Britain worked out an agreement known as the Bermuda Agreement, and there have been no less than eighty bilateral agreements concluded since which reproduce this agreement, usually without even changing a comma.

In other words, you can reach multilateralism sometimes more effectively politically by a series of bilateral agreements; whereas the attempt to get the multilateral agreement in one stroke often falls down.

I would suggest, following up Alec's and Eugene's comments, that the two premiers, if such an agreement is concluded, should indicate in their statement that it is not dictated, not indicated by any sense of exclusiveness or desire to establish a private club; and that they hope that this could serve as a model for similar bilateral agreements with or without whatever modification may be appropriate having regard

to any differences in the provinces. I think this is felicitous language as it was done with the Bermuda Agreement, and the follow-up, as I say, has been astonishing.

DR. FORSEY: It may also be desirable to keep the New Brunswick and Manitoba Governments, for example, informed of what is going on, so that it will not come to them as a novelty, but you say: "We believe you are interested in this. Here is what we are doing, and I think you ought to know about it. We shall be glad to have any observations you have." Then if you have a sudden, ardent request from either or both of them to get in on the thing, it might be worthwhile changing tactics; or if you have the Province of Quebec saying: "We have reason to believe that some of the other provinces would be intensely interested and we would like to haul them in on it". I think you have to have a flexible approach; but in general I should think the bilateral thing offers so many advantages, notably in the matter of speed and ease and convenience, that it had better be pursued very vigorously.

PROF. McWHINNEY: How quickly do you think this could be done, Mr. Chairman?

THE CHAIRMAN: You mean bilateral agreement?

PROF. McWHINNEY: Yes.

THE CHAIRMAN: I would say as quickly as the two prime ministers find it practical and convenient to do so.

MR. GREATHED: Probably after this December conference. They are a little pre-occupied.

PROF. McWHINNEY: Your opinion is Mr. Bertrand would be very receptive?

THE CHAIRMAN: Well, I think so, yes.

MR. GREATHED: Mr. Chairman, I just intervened at that point to ask Professors McWhinney and Brady about the difficulties, because I think Dr. Forsey has answered some of my concerns very admirably there. I was just a little concerned that if it were suddenly announced, other provinces in Canada might say: "Well, that is all that is necessary. We don't have to do any more. This problem is now solved." I did not want any impression created that there was some kind of axis arrangement in central Canada.

I think your last point of keeping the other provinces informed is a very useful suggestion. This was concerning me a bit, that if they were willing to come in now on the terms that Quebec and Ontario had agreed to, should we not invite them?

PROF. McWHINNEY: If you want footnotes, if it ever arises as a practical gesture, I would

be happy to ply you with the statistics. We have almost set up mathematical rules for this thing. The multilateral convention is really an exercise in poetry, but not in very precise or concrete or far-reaching agreements or accommodations. You sacrifice, in other words, concreteness.

Anyway, as a second point, it is an application, surely, of the methodology that Premier Robarts has been pressing more generally as his constitutional philosophy, that you try to solve concrete problems concretely; that you proceed step by step doing the possible at each stage; you avoid all this temptation to write poetry, which is rhetorically impressive but in practice means very little.

I would tie this in with his Bill of Rights philosophy. It makes a coherent and rational methodological approach to the constitutional change.

PROF. MEISEL: Mr. Chairman, I think Mr. Greathed's point is well taken, but I would feel that if the agreement is delayed by as much as one day as the result of waiting for other provinces to come in, this would be a very bad thing. I think we should press ahead as quickly as possible, and then as soon as that is done try to get something

worked out with the other provinces.

MR. STEVENSON: Should we try, Mr. Chairman, to get an arrangement worked out with France as soon as we have to?

PROF. FOX: May I just point out, Mr. Chairman, the obvious, that it is Mr. Bertrand's political difficulties with the unilingual persons in Quebec who desire a unilingual system which are becoming greater all the time; therefore I think there is great need for speed.

DR. FORSEY: There is also the fact, if I remember what Professor Rathé told us, it was urgent to give him a rather better status than he appears to have at the present time. My recollection is somewhat vague now of what he said, but I am tolerably sure there was some indication it was difficult for him to get through to the right people both here and in Ottawa. I don't know about Quebec. It seems to me that if you had a formal accord you might strengthen his hand in getting done quickly certain things he is trying to do which seem to me extremely desirable.

PROF. SYMONS: I am glad Dr. Forsey mentioned this. I know Professor Rathé has often found it terribly frustrating, not quite knowing where he should look for guidance and assistance in decisions. As Dr. Forsey says,

this is one of the by-products, and it would be a very good thing to have an agreement.

DR. FORSEY: I do not want to give the impression that Professor Rathé complained or whined or was looking for status for himself as such. It was not in that tone at all that he spoke; but there were a variety of circumstances in which he found it very difficult to get prompt decisions on matters that seemed to him (and I think seemed to our committee) to be of substantial importance.

You may remember that when Newman was chosen to set up a university in Ireland, there was a feeling that he ought to be given the status of a bishop, or something, in order that he could make the proper impression on the local clergy. Sometimes this is not just self-seeking on the part of the officials, but a genuine need for a certain degree of standing and prestige which will make it easier for them to get prompt decisions.

PROF. McWHINNEY: Would you suggest a bishopric for Professor Rathé?

THE CHAIRMAN: I have been trying to call an interlude for coffee and I appear to have been overtaken by events, but I call the interlude, nevertheless.

PROF. SYMONS: Mr. Chairman, anybody who has set up a university should, I think,

be given the status of a bishop. (Laughter)

--- Short recess.

THE CHAIRMAN: I take it from the discussion that the Committee would support unanimously the passage of the letter and the recommendations?

PROF. McWHINNEY: Yes.

THE CHAIRMAN: On the cultural agreement, which I shall certainly do.

I wonder if we might go on to the distribution of Powers Task Force.

PROF. BRADY: I think, Mr. Chairman, I have to report on that as chairman of the Task Force.

The committee confined its discussion, of course, to the propositions in the Quebec brief on the distribution of legislative powers. On most matters I think the members were pretty much in agreement, although on certain details there was a diversity of views suggested. There was not much time, however, to pursue the differences to any length.

In this report I attempt no real summary of all the many points raised in the discussion. The secretary took down a large wad of notes, and has in fact put them into some shape, and that will be a better

record of the details.

What I am concerned to do largely is to comment on some of the topics, exercising (as chairman) a moderate licence to express also my own opinions, not because they are important but because they may provoke further useful discussion perhaps in this larger committee.

The Quebec brief begins its section on the distribution of powers with the claim on page 29 that the member states (it calls the provinces, or would wish the provinces to be called, states) should retain all powers not expressly granted to the government of the Union. In brief, it should have the residual powers not enumerated.

It supports this claim on three counts. Most Federal constitutions, it claims, beginning with the United States, have such an arrangement. Secondly, it is a protection against excessive centralization and hence reduces friction in the Federal system. Thirdly, it helps to forestall any crisis over jurisdiction in the future. The last two points tend to merge or virtually merge.

The members of the Task Force, I think I am safe in saying, found this argument unconvincing. It oddly neglects, as Professor Lederman in particular emphasized,

the important fact that the British North America Act had, in effect, ensured two residues of powers: first, for the national parliament in the opening sentences of Section 91, and for the provincial legislature in Section 92(16):

"Generally all matters of a

"merely local or private nature

"in the province."

Both residues are considered in the Courts; both have significantly influenced the interpretation of the Constitution. This arrangement in the Act contributes to greater flexibility in the Federal system of Canada, and to greater protection of provincial autonomy than that which the Quebec brief proposes.

The brief appears to assume that an enumeration of a central government's power will necessarily restrict them. The American Constitution to which it refers actually illustrates the reverse. Mr. Justice Marshall wrote:

"A power vested carries with it

"all those incidental powers

"which are necessary to its

"complete and efficient execution".

As a long record shows, under the interpretation of the Supreme Court, these incidental powers in the United States have ranged widely.

The next proposition (page 30) contends that flexibility could be achieved in the constitution by the devices of concurrent jurisdiction and delegation of legislative powers. We can all, I suppose, devoutly pray for flexibility, and in some matters concurrent jurisdiction may usefully produce it -- provided that the paramountcy principle is accepted.

The two original instances of concurrent legislation under the British North America Act -- agriculture and immigration -- have been advantageous. In agriculture representatives of two levels of government have learned by trial and error to demarkate and co-ordinate their activities reasonably well, and Canadian agriculture, we may assume, has benefited in general from the diverse thought and policies of the Federal and Provincial Departments.

In immigration, the provinces before the Second World War were not greatly active, although in Oliver Mowat's time there were some agents sent abroad to encourage emigration to this province; but since the war this subject is increasingly important and, I think we may assume, is going to become more and more important as the provinces become concerned with the difficult problems of economic planning and development.

Both concurrent powers have compelled a considerable measure of co-operative action between Federal and Provincial officials. I think this incentive for co-operation is one of the beneficial results of concurrency. It may not always appear, but it is a result, I think, in these cases, and is likely normally to be a result.

The Quebec brief suggests on page 33 that additional subjects be added to those now under concurrent jurisdiction, as statistics, census, bankruptcy, radio and television broadcasting, cinema, the marketing of agricultural products, food and drugs. No reasons are given for any of these additions.

It would hardly be wisdom to enlarge the area of concurrent jurisdiction without solid and reasoned argument. I suppose one of the handicaps of this method of propositions is that it does not provide as much opportunity for supporting argument as is necessary. Certainly a reader of the Quebec brief is very much struck with this deficiency of any kind of reasoned support for what is catalogued.

In some of these subjects it appears to me, although I am not now speaking for all of the Task Force (I am not sure of that

because we did not really hold any poll of opinion); but it seems to me a good case can be made for the inclusion of almost all in a concurrency list. For example, census and statistics (especially the latter) in that area we have already extensive provincial activities and will have more. Modern public policy-making and administration cannot operate without facts, and fact-gathering becomes a major function of government, an adjunct to practically all policy. That applies to all levels of government and for a variety of purposes.

The techniques of collecting and refining facts collected are steadily advanced, and are furthered by the technology that has developed in recent years.

The provinces are deeply indebted to D.B.S; in turn the D.B.S. is deeply indebted to them. There is useful co-operation in this area. Sometimes there is not as much co-operation as there might be, but there is a substantial amount of co-operation that permits a constant flow of statistical data back and forth between the two levels of government; but the co-operation might be even more substantial and perhaps better if the governments had constitutional

concurrent powers in the field.

Co-operation could ensure against wasteful duplication. Concurrency would enhance the sense of responsibility certainly resting on the provinces for positive action.

Though census and statistics may seem, under modern conditions at least, designed by nature for concurrency, bankruptcy perhaps less so. In that matter the central government's past neglect to take satisfactory action is now evidently being corrected. If it succeeds in producing an effective bankruptcy law for the whole of the country, there would seem less case perhaps for including the subject within the area of concurrent jurisdiction.

The fact, in other words, that I would like to stress is that concurrency is only a virtue where the circumstances clearly require it, and where it liberates initiative and energies that might otherwise be dormant in the agencies of government. 1968 requires more of this type of action than, let us say, 1867.

All the other matters cited by the brief -- radio and television broadcasting, cinema, marketing of agricultural products, foods and drugs, provide opportunities for concurrent action. Co-operative

arrangements, of course, of one kind or another are already there, and it is for the Ontario Government and its departments to assess whether these arrangements are satisfactory and wherein a form of concurrent jurisdiction would actually contribute to progress.

In other words, we are really discussing a subject that I suspect has not been adequately examined hitherto, and can only be examined, it seems to me, in the structure of the provincial government. Rapid changes in technology are changing, without question, the way in which these matters are viewed and must be viewed.

Significant in this context is the implicit and almost inescapable concurrence in some areas of Federal and provincial policy, owing to the mutual inter-dependence of different interests in the economy and society. Rigid and separate categories in the division of legislative power are consequently often difficult to maintain. In classic terms of Hodge v. The Queen, subjects which in one aspect and for one purpose fall within Section 92, may in another aspect and for another purpose fall within Section 91. The Courts, with the most ingenious logic they can command, have had to deal with this type of question and have recognised the concurrency

of certain powers.

Professor Lederman in the Task Force emphasized the importance of this, and he has himself described it in some detail in his McGill Law Journal article on the concurrent operation of Federal and provincial laws in Canada.

The Quebec brief would also introduce to the constitution the delegation of legislative powers -- an expedient, I think, more controversial than concurrent jurisdiction. Such delegation on a terminable basis was advocated by other provinces long before it interested Quebec. Nova Scotia and Saskatchewan, for example, pressed its merits on the Rowell-Siroi Commission and the Commission actually included it in its recommendations in the interest, it believed, of a flexible constitution. It figured prominently in the constitutional conferences of 1960, 1961 and 1964 on an amending formula, and, as is wellknown, became a complicated but integral part of the Fulton-Favreau formula.

It is interesting that in the early meetings of the 1960 and 1961 conference Quebec was opposed to the inclusion of any delegation. It wanted entrenchment of all provincial legislative powers without the complications (it was argued) of a delegation

clause. In later meetings it shifted its position, partly under the pressure of other provinces which sought a delegation clause to ensure flexibility. All the enumerated powers were, in other words, to be entrenched. The other provinces tended to argue: "We must have some element that will introduce a degree of flexibility"

In 1964 Quebec did not alter its position, although Gerin Lajoie, who represented the Province of Quebec in all of these discussions, gave observers the impression that he was somewhat uncertain and, unlike Lesage, perhaps not really interested in the formula, at least in 1964. Much had happened in Quebec since 1961; winds of change in opinion on nationalism were blowing more strongly, and one got the impression that Gerin Lajoie was not quite sure whether this formula was really very apt under these changed circumstances. However, that is obiter dicta, so to speak.

From the outset the Federal Government was anxious that the delegation power should be carefully circumscribed, and that its exercise must be agreed to by a number of provinces before it was finally agreed upon. Alberta (Mr. Manning) thought it ought to be seven, and fought strongly for that large number. Why did the Federal authorities

stress the necessity for a number? In order to avoid a Balkanization of the federation.

In the Task Force Professor Lederman submitted a view that delegation of legislative power but not of administrative authority- that is a different matter - delegation of legislative power from the Federal Government to an individual province or from an individual province to the Federal Government would be an undesirable adjunct to the constitution. It is tantamount to the amendment procedure, even though it is terminable, because of the political circumstances which make termination very often extremely difficult. It could facilitate the establishment of a special status in a province.

Now, there is much to be said in defence, I think, of his position, and support, of course, can be found in the arguments in the Supreme Court in the Nova Scotia Inter-Delegation case of 1950.

There are, however, on this question differences of opinion. Our colleague, Professor McWhinney, in his "New Pluralistic Federalism in Canada" and in other articles takes a very tolerant view of the delegation idea. He can verify whether that is the case, but this is the impression I have.

Apart from Quebec, other provinces (notably Nova Scotia) are likely to follow past precedents in arguing for it. It is clearly necessary, therefore, for Ontario to examine it afresh in all its facets and with reference to current political circumstances.

I am personally inclined perhaps to agree with Professor Lederman. In other words, I have doubts about it as a device. It appears an uncertain type of contrivance; it could, under different circumstances, have good and bad results.

Of course, delegation of administrative authority has been used a good deal in the Canadian Federation and is a useful instrument.

From concurrent powers and delegation, the Quebec brief proceeds to a discussion of the legislative powers assigned to the central governments of the provinces (pages 31 to 37). This large and highly complex subject is treated in the Quebec brief simply by listing heads, which however adequate in a statute is not very satisfactory in a brief. The language is sometimes ambiguous and at all times fails to tell us the purposes behind the lists. What we miss is argument and reasoning. We are

left to make deductions about motives that may be right or wrong, and to me it seems time-wasting to indulge very much in such deductions. The general effect of the classification is to augment substantially the legislative power of the provinces, at the expense of the Federal Government, which is not surprising since it conforms with the general ideas of the Union Nationale Government since it took office.

I mention one or two items where the brief has remarks on specific powers. . It would transfer, for example, the subject of marriage and divorce from the Federal to the provincial jurisdiction. This seems a reasonable enough change, provided that a marriage contracted in one province is recognised in others.

The regulation of monopolies and restrictive trade practices is placed squarely in the list of exclusive powers of the central government.

We have in the same list international and inter-provincial sea and air transport, and international and inter-provincial railways; but there is no mention of telegraphs or other works of inter-provincial importance.

We are told that the Quebec delegation

has not made up its mind on where to place such present Federal powers as criminal law, fisheries, inter-provincial trade and unemployment insurance. Hence in the brief their classification is incomplete and uncertain.

However, they are not as uncertain about placing exclusive power over education in all its forms with the provinces; as well as social security, including all social allowances, old age pensions, family allowances, health and hospitals, manpower placement and training.

There is administrative logic and good sense in bringing social services under provincial control, but obviously such action has fiscal implications of the first magnitude.

I think the subsequent fiscal discussion in the brief seems inadequate in view of its importance. On page 38 we have the brief's general proposition on taxation:

"... member states as well as the

"government of the Union, should

"have access to all sources of tax

"revenue. Only few fields

"should be reserved for exclusive

"use -- property tax, succession

"duties by the states; customs

"revenue by the central government".

This proposition, combined with that in the next page restricting the central government's spending power to matters mainly under its jurisdiction, might seem excellent if the federation was starting its career afresh; but unfortunately the Federal system, like Bunyan's pilgrim, is labouring under the heavy burden, has the heavy pack on its back, of history and past iniquities, which it cannot easily shed. The central government is firmly planted in the income tax field. Its mastery there came as the result of two world wars, each in the nature of a major national crisis for Canada.

As Harvey Perry points out, we have now in theory an approximation to the position that the Quebec brief postulates -- relative equality of access to types of taxation; but it does not help the provinces, not even a wealthy province like Ontario, as long as Ottawa imposes a heavy clamp on income revenues.

This fact perhaps illustrates certain lack of realism in the approach of the Quebec delegation to this aspect of the subject. They zealously continue to address themselves to the task of re-

distributing powers in new and provincial constitutional slots, as if this were the ^{the} important need of/federation; but it is obvious that their contrivances are likely to be meaningless unless the fiscal structure is re-vamped. Even under the existing distribution of powers, the provinces have difficulty in securing the necessary revenues to meet expenditures. Any change in Ottawa's position on income tax can come only from the inter-play of miscellaneous political forces in the federation.

One of these, admittedly, is the threatening posture of French-Canadian nationalism in Quebec, which presumably will continue to be important, even though Mr. Trudeau, having a majority in the House of Commons, attempts to deflate it. It is likely still to accomplish more (I could venture on this generalisation, Mr. Chairman) than the rational calculations of the Tax Structure Committee.

THE CHAIRMAN: Did you say "irrational"? (Laughter)

PROF. BRADY: At least, I assume they were. There is much else I might add to this theme, but I do not think it is desirable for me to elaborate much further on it here.

I have said enough, I hope, to provoke some comments, and enough to suggest that there are actually many points on which Ontario could agree with Quebec, without commitment, however, to the drastic proposals for change in the distribution of powers, which is a characteristic feature of the Quebec brief.

THE CHAIRMAN: Thank you very much for that extensive commentary. The floor is now open.

DR. FORSEY: Mr. Chairman, could I add some footnotes? Professor Brady mentioned this, but I think it deserves emphasis, if I may say so: that the Quebec brief, in regard to concurrent powers, simply ducks completely the whole question of paramountcy.

It seems to me that if you have got two legislative bodies with concurrent power over precisely the same field, you must make some provision for possible conflict between their laws.

As a matter of fact, Section 95 (agriculture and immigration) does make such provision, and says that in case of conflict the Dominion law shall prevail; and the present Section 94 (a) in effect says that in case of conflict the Provincial law shall prevail.

It seems to me that the Quebec brief simply ducks this whole question, which is absolutely vital, and I make the point with the more emphasis in that I think (if my memory serves me) Dr. Lederman, with his great professional authority, also made it with great emphasis.

There is even the preposterous statement here one place that in case of difficulty the decision should go according to the subject matter, whatever that means. Yes, here we are on page 33:

"Should a conflict arise precedence
"could be given to either the
"legislation of the Union or that
"of the member state, depending on
"the subject matter."

If you can think of anything vaguer than that, or more likely to breed difficulty, I would be much pleased to see it. It would be an intellectual curiosity of the first rank.

Then there were certain specific matters that came up here that I think deserve to be mentioned in addition to those Professor Brady mentions.

For example, if you look at page 31(n):

"The establishment of private
"corporations in fields falling
"specifically under Federal

"jurisdiction"

this would be a considerable narrowing of the existing power of the Parliament of Canada to incorporate companies, and the matter is not without some practical importance.

Dr. Lederman raised the question of the British Columbia Electric expropriation case, where the fact that the British Columbia Electric Company was a Dominion corporation netted it several millions of dollars in compensation.

The thing is underlined, of course, if you look at page 42. Many of these things have to be seen to get the full effect of them in the context of the whole brief, which is really one of the most extraordinary documents ever produced in the history of the world, I would say; but if you look at page 42 you will see that one of the things that the Quebec officials want is that the right of constituent states to expropriate any private property in return for compensation, should be absolute. If you take that in conjunction with 31(n), you might get into some very serious practical difficulties, as illustrated by what would have happened in the B.C. Electric case if there had been no Dominion

corporation act there. Another thing that is not mentioned -- very significantly, I think, not mentioned -- on page 31 under (k) is interprovincial and international highway transport, which at present is within Dominion jurisdiction, though administratively it is confided to the various provincial utility boards, whatever they may be called; but Dr. Lederman gave us to understand, if I remember correctly, that the central government was now feeling rather sorry that this had been confided administratively to the others and would rather like to take it back if it could, because it had given rise to some practical difficulties.

If you look also at certain things on page 36, they are rather interesting. I do not mean anything about marriage and divorce, because Dr. Lederman made the point there that this would be dangerous unless you had a full faith and credit clause so that a marriage validly concluded or a divorce validly secured in a particular province should not be called into question in another province on the ground that the thing was contrary to the law in that particular province. However, if you look at (c) it seems to me

that very careful enquiry at least is
required there before the rest of us
should buy that:

"... exclusive powers of the

"state --- "

that is, the provinces:

" --- over securities trading,

"control of financial institutions

"other than banks, especially

"savings and credit unions,

"insurance companies, co-operatives,

"foundations, trust companies".

This seems to me to be a point where
the Ontario officials might very well raise
a series of very large question marks.

Then (d):

"Labour relations and working

"conditions of all private concerns

"operating within such territory".

This made me sit up, in my capacity as a trade
union official, because it looks as if that
would mean, depending on what you mean by
"private concerns", that the labour relations
of the C.P.R. would become a matter in the
exclusive jurisdiction of the various states.
Think of all the mish-mash of difficulties
you would get into there if you had
collective bargaining taking place on the
railways according to ten different

provincial collective bargaining acts.

Words fail me. I fall back on Mr. Meighen's expression in such cases -- "gosh".

These operations like the Bell Telephone Company, too, and there are a variety of them, now operating in various provinces, which at present work and, it seems to me, should work, under some sort of nation-wide labour relations law, under this would be fragmented, splintered, shattered to fragments, to the great inconvenience of the public of the whole country.

Road transportation here, you see, it gets in. It is not an accident that they leave out inter-provincial and international highway traffic, no, not on your life -- a set purpose.

Then (f), immigration and immigrants, this requires some explanation, because it might conceivably infringe on the whole question of national citizenship. It is in very vague terms on immigration. You might get a position where you had Quebec citizenship or Ontario citizenship or Newfoundland citizenship, and the electoral roll of a province might say that citizens of the province can vote but the chap who comes in from outside, "No,

sir, not for you".

This is not fantastic if you remember some of the things that were said at the time of the passage of the Prince Edward Island Labour Relations Act of 1948, when the attitude of Prince Edward Island government at the time was almost incredibly isolationist.

Then you get (g):

"All works and undertakings

"located within state

"territory"

If that were left as it stands, the grain trade would fall to be regulated, as under the judgment of the Supreme Court in 1925 (I think it was) it would have been, by the provincial legislatures, which seems to me pure unadulterated nonsense. We escape from it, of course, by the use of 92(10)(c) declaring all the grain elevators works for the general advantage of Canada. That would go out, that particular provision of the present British North America Act would disappear; and (g) here, if it were accepted, would mean that the grain trade would go smack back to provincial jurisdiction.

As to international relations, of course I suppose pretty nearly

everything has been said on that, but it is interesting to note that if you take the proposals for provincial jurisdiction over into international relations (which it seems safe to say most of the provinces would not want to exercise at all) if you take this in conjunction with the stuff about the immediate proclamation of a Quebec republic within the Canadian union (a proposition on which a variety of comments might be made) if you take this in conjunction with that, you get the idea of Quebec being represented in certain international conferences in which the Union as they call it would not be represented, would not be interested.

If you take the idea of the president of the Republic of Quebec accrediting delegates to these conferences, negotiating and signing agreements on a variety of matters, and having these put before what is now to be called the National Assembly, I find it difficult to resist the conclusion that in a very short time you would have well under way the process of Dominion status for Quebec: the same sort of thing that happened to Canada's status in international affairs would happen to Quebec's status. I have

not the slightest doubt that these gentlemen are well aware of this, and they have put this in there deliberately in full conscience of this, simply because this is what they want to have happen. One fine morning you will wake up, and a foreign state will say: "They are at this conference and that conference; there is the President of the Republic of Canada, National Assembly of Canada. They are obviously an independent state. If there were any vestiges of their imperial connection with what was once Canada, obviously they are now completely inappropriate and swept away." Quite a long footnote!

THE CHAIRMAN: May I return to the very first point, which I think is a fairly basic question, and that is the question of who has the balance of authority in terms of the conflict over concurrent powers. Surely the other way to look at the question is: what is the virtue of having concurrent powers? Is there not some merit in having these separate?

MR. STEVENSON: May I just add a footnote to that? I would be very curious perhaps to get some reaction from

some of the members of the Committee to Dr. Forsey's question about the business of paramountcy. If one did take the seven sections suggested in the Quebec brief on page 33 for concurrency which Dr. Brady gave a case for, then I wonder, under each of them, which level of government should have the paramountcy in the view of the members of the Committee?

Agriculture and immigration, of course, now have Federal primacy, but the others, not being concurrent powers now, obviously there is no provision for it.

PROF. McWHINNEY: Perhaps you can fill us in. How much of all this is really involved vis-à-vis positions at your Conference of Officials, and how much of this is the usual expendable lawyer's brief drafted quickly and a lot flung in?

What, for example, is Ontario pressing, if anything, in this area of division of powers? I take it from reading the Press, that Ontario may have specific proposals for reallocation of taxation powers, or at least if there is any Ontario thought it is in that area. Is that issue in the Committee of Officials narrowed down to a few specific things?

For example, we make it a point

of art to advise our law students to avoid taking positions in the abstract on issues like paramountcy and the like. I would be interested, for example, if something concrete is emerging in the tax area, to know whether Ontario is pressing for any changes, or whether Quebec and Ontario have similar views or different views. Then one could really give an answer on the paramountcy issue.

DR. FORSEY: The only point I was making was that you have got to get an answer.

MR. McWHINNEY: To this Quebec brief?

DR. FORSEY: No, to the question of paramountcy. You cannot simply say "concurrent jurisdiction" and let it go at that.

PROF. McWHINNEY: What I was really wondering about, it is obviously a huge document, and it bears certain elements, I thought, of having been written by six or seven people and assembled. I am wondering if anybody (meaning at any of these Federal-provincial meetings) is discussing it on a point-by-point basis.

I had the impression, without attending these Committee of Officials

meetings, that the thing was narrowing down, the issues of division of powers were narrowing down to a few key areas, and that there might well be a position where provinces -- for example, Quebec and Ontario -- had similar views.

One way of approaching tax, for example, would be a reallocation of power, to give exclusive power to one set of governments, and exclusive power over other areas to another. Another method might be to give concurrent powers, and to establish a paramountcy thing, and what Eugene mentioned, of course, becomes vital here.

In the Australian case, if you remember the famous income tax case, it was the decision as to paramountcy which really ended the income tax powers of one set of governments. You had the two powers, but the moment the court said: "Well, Government X, Federal Government has the paramountcy", the federal government said: "We will tax to the hilt and collect first".

PROF. BRADY: Are you suggesting that the paramountcy might vary with different kinds of taxes, as it were?

PROF. McWHINNEY: I think it is feasible, certainly with different areas

of constitutional powers.

I see no reason why you have to take, for example, the Australian position that paramountcy always rests, no matter what power, with one set of governments rather than the other. I can well see a situation where you might decide: "We will have concurrent powers in A.1, B.1, C.1, D.1 areas, and in area A.1 we will give the federal government paramountcy, area B.1 we will give the provincial government".

I do not think you have to give an absolute answer, but it comes down to discussion of concrete problems and concrete areas; and, you know, it would be helpful to know where there is a confrontation.

I agree with Eugene's reaction to this brief, that a lot of it looks carelessly drafted. I felt I detected a lot of different literary, legal styles in it, and therefore it is a priority exercise for us going through point by point.

PROF. BRADY: There is a problem there, I felt. Are we going to waste energy on it? I suppose we are not wasting energy. We have got to look at it, examine its details, certainly, but I cannot think of this as being a very important jumping-off

point in the discussions.

I would like to comment on the question the Chairman raised which, if I understood him right, was: What is the value of concurrency at all?

THE CHAIRMAN: Yes, why have it?

PROF. BRADY: I am inclined to think that concurrency is becoming a rather important item, so to speak, in a Federal system, because the range of government activity has widened greatly in the Federal field, in the provincial field, and there are areas of activity that were not contemplated certainly in 1867 as having to do with any government, that are significant now and that are of interest to both governments.

I mentioned the matter of census and statistics. I think in 1867 you can quite understand draftsmen being satisfied that this certainly is a Federal role, but you cannot argue today, in other words, with such emphasis that it is clearly a Federal role. It is a Federal role, but there is also a provincial interest here. We assume that whatever is done with a census, that there will be collaboration.

I think Harvey Perry pointed out that in business corporations are getting

dreary with the enquiries which are made by government agencies of one kind or another. It is true, and I am afraid they will have to continue, however, to face these. These enquiries are part of the technological industrial civilization that we have developed.

MR. PERRY: The only problem is to leave a little time to do some of the normal work of the staff.

THE CHAIRMAN: Have something to report on.

PROF. BRADY: Well, it seems to me that there is an interest here in many roles in both areas, and how you can cope with that without something like concurrency, I am not sure. You see, if you do not have concurrency you have the danger, I think, of, say, the provincial authority feeling uncertain really of whether it can act in the area, and being hesitant about action; or if it is acting, it is acting probably in an ad hoc and haphazard fashion, it is unsure of itself, and it may be an area in which the province, if it really realizes that it has scope here, can generate a good deal of thinking amongst the civil servants and politicians as to what is possible, and not merely amongst these two categories but indeed amongst citizens and organized

interests and so on in the province.

I think the concurrency is important today, because of the wide range of government activity and the necessity for that activity to be dictated by as much initiative in thinking out policies as possible.

I think I have put this not very aptly, but there is, I am certain, an idea here that is very relevant to any constitutional change.

THE CHAIRMAN: Well, that is very persuasive, I think, and it also really sets forward the two positions between which one must tread carefully in this exercise: on the one hand to achieve enough tidiness and order in the distribution of power that you do not have constant contention or poaching; and, on the other hand, to achieve enough flexibility that you can deal with those matters which are either unpredictable or extensive in their impact on both jurisdictions.

I quite agree that the day one attempts to clinically separate every aspect of life, tomorrow it is going to be obsolete. Perhaps that is the direction one is going to move in.

I did want to return, however, and answer Professor McWhinney's question about the way in which we have been dealing with

the distribution of powers in the Continuing Committee of Officials. This is a subject which has not been dealt with in any detail whatsoever, but will be at the meeting of officials next week.

Ontario has not put forward yet a set of specific proposals in the fashion of Quebec, on the distribution of powers, although we have a number of ideas that we have discussed within the government. The principal guide-line, of course, is the one which the Prime Minister of Ontario has put forward on numerous occasions; that is, that we are not approaching distribution of powers as an academic exercise, but as a functional exercise; that the objective is to make the Federal system function more effectively, and this is why, in our judgment, it is inseparable from the question of an adequate distribution of revenue if that is to make those functions effective.

It means, therefore, that in our view you have to look at these simultaneously; you have to look both at your responsibilities and at your capacity for discharging those responsibilities.

You may come to a situation, therefore, perhaps that if one level of government, for example the Federal Government, are passionately

determined to have a certain programme -- say, the Medicare thing -- perhaps they should really carry that out and take all the financial consequences that go with it, and that is a question that should not be dismissed from consideration, I think.

DR. FORSEY: May I say something in relation to something Professor McWhinney said as to how seriously to take this document. In one sense, I suppose you can say you do not need to take it too seriously, any particular part of it at all events, because avowedly it is the work of certain officials who are named, and it has never been before the Quebec cabinet.

On the other hand, I think a good deal of it has to be taken seriously in this sense, that it needs to be looked at carefully and thought about with a view to taking some kind of position on certain of these things if they do come up finally as propositions from Quebec or anybody else.

A good deal of this, it seems to me, is almost certain to come up in one form or another. I shall be vastly surprised, for example, if we do not get some proposition from Quebec about concurrent powers, and the question immediately arises: what powers should be concurrent, why, and who is going

saying: "We haven't got anything to say about it at present", or, what is worse, to the point of saying: "Well, it looks all right", and next morning waking up and saying: "Oh, my gosh, what have we agreed to?" I think these things have to be taken fairly seriously in that way.

There are one or two other things I think I should like to say here. One is that in the list of concurrent powers I myself can certainly say you would have to have central paramountcy to all of them.

Then there is another question that we have had a great deal of what I think Dr. Lederman called judicial paramountcy. There are a great many areas or have been at one time or another, in which the field could have been occupied by the Parliament of Canada but in fact has not been, and in the unoccupied field the provinces have then legislated as something incidental to their enumerated powers.

If, as and when the Parliament of Canada legislated under the specific head of 91, for example, then the courts, if I understand it correctly, have almost invariably ruled that the Dominion legislation is paramount -- unless, of course, it turned out that it is colourable legislation and

invades a provincial field. There is a great deal of -- I should not have said paramountcy -- judicial concurrency now, unless I am much mistaken or I have misinterpreted what I understood Dr. Lederman said.

PROF. CONWAY: Will you be discussing this proposition, Mr. Chairman, with your Quebec counterparts?

THE CHAIRMAN: The Quebec propositions?

PROF. CONWAY: Yes.

THE CHAIRMAN: Yes, next week.

PROF. McWHINNEY: In a private meeting.

THE CHAIRMAN: No, in the meeting.

PROF. McWHINNEY: In the general meeting?

THE CHAIRMAN: Yes.

PROF. McWHINNEY: Are the Quebec proposals in fact the agenda subjects, among all the other governments?

THE CHAIRMAN: Yes, they are on the agenda under the subject of discussion of the distribution of powers.

PROF. McWHINNEY: I would be very sorry, nevertheless, and it would surprise me if the issue came up, for example, of taking a position on concurrency or paramountcy in the abstract. If it did come up, I frankly would recommend that you simply say: "I am very sorry. It is an interesting philosophical

point, but what are you specifically speaking about? Are you speaking of marriage and divorce? Let us hear your substantive proposals. If it is finance, let us hear what they are.

By the way, I can amplify the point Eugene made which I think is very interesting. The trend certainly of the courts today is more pragmatic in philosophy, but there is a tendency towards saving legislation wherever possible and not to striking down things because of abstract conflicts, and this is almost inevitable in the process of government.

--- Off the record discussion.

What I am saying is, in practice you get a species of concurrent exercise of power in every important problem by both provincial and federal government in every federal system; and the courts are no longer giving an abstract decision but tending to uphold all the legislation coming before them, unless there is a concrete conflict. I think it makes a good deal of sense.

Even in a constitution like the American in which I do not think there is any formal concurrent power, obviously the federal commerce power operates concurrently

with certain other exercises of state power, and it seems to me a logical part of any working system.

On the issue of paramountcy -- and this is why I stressed my hostility to giving an answer in the abstract -- you might argue that the practice of federal states tends to be to give paramountcy to the federal government; but I can well see that if the Prime Minister was serious about flinging back certain areas of social welfare to the provinces and making them assume responsibility for them, getting out, I could well see the Province of Ontario taking a position that "we want very definite tax powers of our own to finance these operations; and if you, as the Federal Government, want them to be concurrent, we want paramountcy in this area". You may have to take that position.

I could well see a case for Federal paramountcy, for example, in divorce law, if there is a set of competing provincial/Federal laws; but in the finance area one may well want to insist that we want paramountcy here.

This is why I would say: do not take a position in the abstract, and insist, if anybody raises the issue, on their indicating precisely what they are discussing,

and reserve your decision on paramountcy until you know what power it is, what area it is, and how it affects your own interests as a government.

This is why I wondered about this Quebec brief. I assume tax will come up, and Ontario will be interested in discussing tax. I assume foreign affairs will come up, although the latest word from Ottawa is that this has been quietly resolved. One understands Claude Morin made an agreement last week with Marc Lalonde and this Niger case is being solved very amicably and there are going to be two governments present and two invitations. So maybe there would not be direct conflict there.

Bertrand's position is a little different from Daniel Johnson's in a number of areas, but I suppose if there is going to be part of this Quebec brief raised, finance, probably foreign affairs -- what other areas? Some of these others you mentioned -- fisheries at the moment? I would be very surprised ---

DR. FORSEY: Unemployment insurance may come up.

PROF. McWHINNEY: Unemployment insurance.

DR. FORSEY: I could not agree more

with Professor McWhinney about not taking a position about paramountcy in the abstract, except I think you have to emphasise that somebody has got to be paramount in case of conflict. When it comes to saying: "Should the paramountcy always go one way or another?", no, I do not think it is wise to take that position. You have to look at it case by case, power by power, and in some instances you may have a perfectly good argument for provincial paramountcy and in others for national paramountcy, but I do think that one of the most amazing features of this document is that they simply duck the question of whether there should be any paramountcy at all. Worse, they actually say on page 11, paragraph 2:

"Any claim to paramountcy on
 "behalf of one order of
 "government is likely to cause
 "conflict, as has been variously
 "demonstrated by the constitutional
 "history of the United States and
 "the early years of Canadian
 "confederation" ---

-- which I think is a most novel version of American constitutional history.

PROF. McWHINNEY: Let me bring out a challenging suggestion here. If Mr. Trudeau

flings back certain areas of social welfare, certain major ones that the Federal Government has been responsible for or instigated, if he flings them back to the province I could well see a situation where the provinces might wish to insist on paramountcy in the income tax field -- this province, it is quite possible. If the social welfare area goes back to the provinces by the Federal Government's own choice, you are going to need a tremendous amount of revenue.

Mr. Trudeau has also said that he believes that the provinces should bear a political responsibility for tax, and if they suggest the tax area is going to be concurrent, it may well want the provinces to insist on paramountcy in certain areas of the tax area.

THE CHAIRMAN: Incidentally, in your earlier comments about judges I was not sure whether the conclusion that emerged was that judges should be retired while they are still very young or not appointed until they are very old.

--- Off the record discussion.

DR. FORSEY: Incidentally, may I just add this, that on a lot of this

business of the division of powers, it is rather difficult to take up a final position unless you know what is going to happen to the Courts.

THE CHAIRMAN: Yes.

DR. FORSEY: If your Supreme Court is going to be re-vamped in a certain way, your division of powers may turn out to mean one thing; if it is going to be re-vamped in another way, it may turn out to be another thing.

PROF. McWHINNEY: By the same token (and I think you almost implied this, Eugene) it is possible that this no position on paramountcy issue, that curious phrase that you mentioned, is deliberately directed towards a situation of a new court that reflects political forces in the country, which would presumably mean -- I think the phrase you quoted was that the problem should be solved case by case as it arises. If there were this re-constituted court, you would get a species of political compromise every time a problem arises, much as you get at Dominion-Provincial conferences, and then it would make sense; but I agree with you it does not make sense with the court as at present constituted.

MR. STEVENSON: Mr. Chairman, I wonder if I could follow on one of Dr. Forsey's remarks about the difficulty of taking a firm position on something like concurrent powers until you know what happens to the courts.

This has been one of the problems, I think, of procedure in the whole discussion so far. Should you decide on something until you have really looked at the whole package? It has come up certainly very strongly on fundamental rights. Can you agree on entrenchment of a Bill of Rights before you know what the distribution of powers is going to be, what the constitution of the Supreme Court is going to be?

I wonder if the group as a whole would generally agree that even at the risk of prolonging the whole discussion, that we really should be taking a stand from Ontario's point of view that there is such an inter-connection between all of the constitutional issues that one really must at least go through once the gamut of the main issues before coming down to one, two or three very firm decisions.

DR. FORSEY: It seems though there, that you would have to do something

concurrent, *pari passu*, or separate sub-committees would have to consider these various things and arrive at tentative conclusions adding a proviso at the end" "This is not an entirely firm conclusion on this particular matter, because something depends on certain other aspects of the matter, conclusions of some other sub-committee;" but I should think it would prolong procedures unduly if you insisted on going through the whole work before you got down to, for example, the division of powers.

It seems to me you can arrive at certain tentative conclusions about division of powers and put in a proviso at the end that "we may have to take another look at this when we have dealt with certain other matters like the constitution of the Supreme Court, the constitution of the Senate, for that matter."

MR. GREATHED: I think, as Mr. Stevenson indicated earlier when we were talking about the report on the Continuing Committee of Officials, I think we have always regarded our propositions in just that light.

DR. FORSEY: Yes, so I gather.

MR. GREATHED: That you can submit them or withdraw them and change them as time goes on, and I think this is the case with distribution of powers.

DR. FORSEY: The difficulty about that, of course, is that you may sound just woolly and may not appear to have any firm ideas about anything at all, but I think that difficulty is not insurmountable. You do not want people to be in the position of saying: "We can't say anything about that because we have to wait for this."

If, for example, you had a proposition that, let us say, citizenship should be an exclusive provincial power, then you would almost say at once: "Well, this does not look too good" -- at least, I presume you would; that you won't have much left of any recognisable Canadian entity if you have not even got a Canadian citizenship. If this is something to be determined exclusively by provincial legislation, we can't very well take that, no matter what court, senate or anything else we get.

THE CHAIRMAN: It was the intention of the Continuing Committee of Officials to get into a general discussion

of the distribution of powers next week, not unlike the discussion we are having here; but we felt generally -- and I think Quebec felt this particularly -- that it would be premature to start taking positions on this; that, again, our exercise has been to review the whole question of those issues that emerged in tackling the distribution of powers; then from there to prepare ourselves to meet these, as you have said, Ted, in a very specific and concrete way, bearing in mind the relationship to all other areas that are developing, Supreme Court and so on.

PROF. McWHINNEY: It seemed to me, just from following the Press reports without your first-hand information, Mr. Chairman, that the tax issue is going to be raised ---

THE CHAIRMAN: Definitely.

PROF. McWHINNEY: -- and cannot be separated from the issue of who is going to assume responsibility in the future for social services; because Mr. Trudeau has raised this issue, flinging the ball back to the provinces, and these two are going to be inter-related, although I gathered from our discussions in the spring that even with the present or pre-Trudeau, if

you wish, Federal responsibility in the social service area, Mr. Robarts would still have been interested in raising the tax and finance issue in any Dominion-Provincial conference, and maybe that becomes a top priority politically.

THE CHAIRMAN: You see, the whole thing, why it is a relevant part of a constitutional discussion in the sense of who is going to do what and how, is that the whole issue has been debated on that level more in the Press than in the meetings, that the provinces are seeking the Federal Government to turn them over moneys, as if you went and the treasure chest was just turned over across the table. That is entirely a separate proposition from saying that you have a number of functions to be fulfilled in the country; you have eleven different governments that are going to fulfil them. You have certain tax fields, you have certain responsibilities. How are you going to construct the thing to make it work? -- bearing in mind that there is going to be political pushing and shoving and so on; but that you have to take that kind of approach to it. Otherwise you will forever just be talking about the

appearance of asking someone to hand over something and someone to take something away.

I think the whole question is not so much this give-and-take, as whether you can arrive at a so-called viable position.

DR. FORSEY: I wanted to emphasise the point that Professor Brady had made so admirably, that in these discussions you can at least first of all sort out certain things: "Well, some of these things really are not of terrific importance, and others are". Secondly, you can find out the reasons for some of the proposals that are put forward.

Necessarily these had to be rather summary. Our own Ontario draft proposals are also very summary, I think; but in many instances what is important is to get the reasons behind them. You may find that for what looks like a preposterous suggestion there are quite powerful reasons, or you may find that for what looks like an innocent suggestion to which there would be no objection, there may be reasons which make you say at once: "Oh, wait a minute."

THE CHAIRMAN: That is right.

DR. FORSEY: This I think you can do very well without taking up firm positions

and saying: "We will never budge an inch on this." At least you will know just what it is you are taking up a position on.

THE CHAIRMAN: We must be specific. I can't remember whether I told the story in this Committee before about a meeting I was at a number of years ago in the Institute of International Affairs (I think perhaps Ted, you and Professor Brady may have been there) where General Faulkes was discussing, in the early discussions in Nato, about how the multi-lateral Nato force is to work in terms of the critical question of who actually controlled the finger on the button at the certain point. John Foster Dulles said: "Well, you know, I think it is one of those things that is better to leave a little fuzzy". So the real question is how fuzzy some of these things are going to remain.

PROF. McWHINNEY: A lot of these things, reading this very careful and admirably prepared statement from Ontario, clearly are trifles, little honorific footnotes. Some of them are responses to what strike me as Federal proposals introduced for bargaining purposes; because I imagine the Federal Government's proposal to bring the provinces in to the

Senate-appointing process and possibly a provincial Supreme Court appointing process, these are Federal gestures designed to get provincial co-operation in other things. Maybe it is just the entrenched Bill of Rights they want provincial support for, or maybe something else; but at a certain stage I suppose you have to come down to a decision of what concretely is Ontario really interested in, what sort of qualifications really go to the vital interests of Ontario and are not either honorific additions or responses to Federal proposals.

I suppose it is in the tax field, is it not, and it is contingent; it has to be based on a series of contingent positions which depend on how much, if at all, the Federal Government is disposed to continue in the social service field in spite of Mr. Trudeau's recent remarks.

I would be interested at some stage of the afternoon, if it were discreet and if it were proper on your part, to hear from you on that, Mr. Chairman.

THE CHAIRMAN: Very good.

PROF. FOX: I just wanted to make two brief remarks, Mr. Chairman. One is that I think there should be underlined

what you have to say about tax power to carry out the functions. I think that is a proper approach.

The second point is one I think we have overlooked, which Bill Lederman made when we were engaged in this Task Force in our examining this brief; and it struck me at the time with some force because I did not hear anyone else make it. It concerned the specific problem of census and statistics, and he raised the point that we were moving into the computer age, and that he thought this was a roundabout means on the part of Quebec to secure control of an area of technology. Now, that was a new thought to me, and I think it needs also to be underlined at this point and perhaps kept in mind.

MR. STEVENSON: It might be pointed out that the Quebec Government has had quite a sophisticated view of statistics for many years which has complemented D.B.S. in a number of respects. It has actually, as we have and as Alberta has, done some of the same things that D.B.S. is doing, apparently, such as a census of manufacturing. A member of the Quebec Bureau of Statistics staff has

come directly from D.B.S.

We are working in Ontario now to a situation where in the municipal field the annual assessment procedure may almost produce an annual census. It is the kind of technological revolution which, as Dr. Brady says, is almost inevitable if governments are to make the best use of the information that is being thrown up in the course of administrative operations.

PROF. McWHINNEY: What was the fear here, Paul; what was Bill's fear?

PROF. FOX: Bill pointed out that there may be in a number of these cases (and he used this as an example) there may be a very innocent phrase appearing to convey one thing to people thinking of traditional methods but which, because of changing technology and function of government, implies a great deal more.

All I am suggesting is, in line with what Eugene said a moment ago, that each one of these specific suggestions needs to be examined carefully in all its implications.

PROF. McWHINNEY: There would be no objection though to the provinces getting into the computer field, I take it?

PROF. FOX: No, it is the implication that if you say this is a concurrent power and do not examine the question of the paramountcy, it may mean that in effect in five years time you have turned over a much wider area of power to the provinces than you thought you were agreeing to at the time.

PROF. McWHINNEY: This would be one of the areas where I would have thought this so-called rule of reasoning the courts are now talking about would be obviously applied. It is difficult to envisage a conflict between provincial and Dominion government in this area, whereas in other areas you can really see a conflict and the need for paramountcy.

MR. STEVENSON: Perhaps by putting in Federal paramountcy in that sphere, you get almost an automatic compulsion towards the use of common bases, classifications, where D.B.S. is the obvious central co-ordinating agency for any provincial statistical operation. This is the practical way things are now developing, where I think in practice the provinces are very much in the statistics field, Section 91 or not.

DR. FORSEY: I just want to be

sure of the reasons, as Alec pointed out. You want to find out why they think this ought to be concurrent, what they have in mind, and think about your own position on it. I am awfully glad that Paul Fox brought up that point of Bill Lederman's. It does underline the necessity of looking at these things carefully and finding out exactly what you are getting involved in, and, incidentally, not leaving more to the Courts than you have to. You don't want to leave the things totally without guide-lines.

THE CHAIRMAN: With the permission of the Committee, I would like to suggest we break off now for lunch, and come back after to a discussion of Items 4 and 5.

Lunch will be served in this room. I have to slip off for a little while to another commitment, and I shall be back here at quarter to two, when we might resume in full session; but I was going to suggest it might save some time, if there is a hiatus between the conclusion of your lunch and the beginning of the resumption of the formal meeting at one forty-five, if you like to have an informal discussion with the staff on some of the questions arising out of the

propositions, which might generate a bit of informal discussion, and save a bit of time. Then we can come right in and work through them systematically when we resume at one forty-five.

DR. FORSEY: May I ask one other question before we break up. Is the rest of this Quebec document going to be coming up for discussion at the next meeting of the Continuing Committee, because there is an immense amount of stuff in here.

MR. GREATHED: Well, there are bits and pieces of it have been put in various categories and various of the propositions have already been discussed; but there are certain areas that the brief deals with which the whole Committee has not even begun to look at, but in due course there is no doubt the whole thing ---

MR. STEVENSON: The way the Secretariat of the Continuing Committee is operating is to take the propositions submitted by each government, classify them under headings of general principles, and then come up with a document which may be a general principle with six propositions submitted by four different governments, but which may all express the same view or may express conflicting views

on what is the general principle. Then
we have to discuss the general principle.

--- The meeting adjourned for lunch at
12:30 p.m.

--- On resuming at 1:30 p.m. (Professor
Brady in the Chair).

PROF. BRADY: We are supposed to
have an informal discussion, I think, before
the opening of the meeting by Ian. I think,
Ed, you are going to tell us what we might
discuss.

MR. GREATHED: I would just like to
explain a couple of things, Mr. Chairman, if
I may. First of all, the twenty-two
propositions which were sent to you on
November 22nd are really intended to fill
in some of the categories which the
Continuing Committee of Officials hopes to
discuss by the end of its last meeting
next week and before the December conference.

As Mr. Stevenson was saying earlier
on, the Continuing Committee has broken
down the various topics for discussion
into about fourteen categories, and by
December 16th I think we will probably have
discussed about five of those. If I
recall this correctly, the first will be

the object of the review; the second category will be the objects of confederation; the third category, fundamental rights; the fourth would be the constitution of the central government, constitution of provincial governments, constitution of the judiciary, and a preliminary discussion of the distribution of powers.

So the intention of this particular set which you have in front of you now, is really to permit Ontario to make some contribution in this particular area.

Since we sent them out, I know I have on my copies had some second thoughts about style and a couple of points on content, and so on, and I think, like most drafts, they go through these rather rough stages at the beginning; but we look forward, as I said in the note, very much to your views on these.

We also have two further propositions which, due to mechanical failures, etc. we could not get out on November 22nd. Can you distribute those now, Gary. They are both on the constitutions of provincial governments, so if you could just include them in that section that you already have on the constitutions of provincial governments, then we can discuss those two

propositions when we get to them.

Finally I might just note that I was somewhat amused by Professor McWhinney's comment this morning that he detected a certain conservativeness in the tone of this particular set. I must say it is a novel accusation for the Secretariat.

MR. McWHINNEY: No comparison to earlier drafts.

MR. GREATHED: We have not been accused of this particular thing before, and it is rather comforting.

DR. FORSEY: Certainly never by me.

PROF. McWHINNEY: Are you known as the young radicals?

MR. GREATHED: I don't know, but I don't think the term "conservative" was ever applied.

PROF. McWHINNEY: What I really meant, they seemed to be more conservative than previous proposals, as if you had consciously made them less innovatory than before.

MR. GREATHED: I don't think so, and I don't think, on what you said earlier, that it was a reaction particularly to propositions that have already been submitted in this area. I think these were views we thought were reasonable ones in the

circumstances.

MR. STEVENSON: A lot of them are housekeeping areas.

MR. GREATHED: Exactly.

PROF. McWHINNEY: I thought your proposition on the court had taken you back a little closer to the status quo, the existing constitutional set-up, than earlier ones. That is the sort of comment I was making, which suggested a compromise resulting from confrontations.

MR. GREATHED: I hope they do not suggest no change at all. I think we simply learned from our betters on a variety of technical issues, and this has been extremely helpful.

MR. PERRY: You will probably live to regret you made that remark.

MR. GREATHED: With those preliminary remarks, Mr. Chairman, I would just like to say that this is really the background to comments on this particular set of (now) twenty-four propositions which we would very much like you to consider this afternoon.

PROF. BRADY: I suppose we might begin on page 1.

PROF. MEISEL: Hear, hear.

DR. FORSEY: I protest against this as a revolutionary proposal, Mr. Chairman --

the new Left. (Laughter)

PROF. FOX. Mr. Chairman, in what detail do you want us to discuss these, because I have some detailed comments on some of them, and also textual suggestions which are minor. Do you want all the itty-bitty points as well as matters of issue?

MR. GREATHED: I think insofar as time allows, the itty-bitties would be very good.

MR. STEVENSON: With the proviso that we might hope that we had at least a preliminary run-through of all of them.

PROF. McWHINNEY: Except that these are not constitutional drafting proposals. They are suggestions, are they not, which may later become the subjects of drafting. So therefore the grammatical or stylistic points are not of great relevance, are they? It is the substance of the idea that concerns us, is it not?

In other words, nobody is going to adopt this immediately as a proposal to be a new section in the constitution, in the words in which it is put.

MR. GREATHED: Exactly.

PROF. FOX: My first point then is: What is the significance of the phrase

"duly enacted" in line 1?

PROF. McWHINNEY: Legalese.

PROF. FOX: It implies that if they were not duly enacted, then you would not disallow them.

PROF. McWHINNEY: It should be struck; it is pompous legalese.

DR. FORSEY: Surplus verbiage.

PROF. FOX: In the third line it should be "are" instead of "is", if you want to be itty-bitty.

MR. GREATHED: Excellent. I picked that up myself.

PROF. FOX: Explanation: "each level". This we discussed before. Implies an inferior and superior set of governments, which I object to.

MR. GREATHED: Yes, generally we have used the term "jurisdiction" or "sphere" or "orb" or some other term.

PROF. SYMONS: Be careful of that word "orb". (Laughter).

DR. FORSEY: The explanation, if provincial legislation is capable of being reserved or disallowed on advice of the Federal Government, I suppose if it is reserved it is presumably not the advice but rather the instructions; if it is disallowed, it is the advice to the Cabinet by the Governor-

General.

I should want to enter a caveat on this particular thing. It seems to me this might be a bargaining counter from somebody (presumably not Ontario) in relation to some entrenchment of fundamental human freedoms. This power could be used (I admit it has rarely, if ever, been used) to safeguard certain fundamental rights and freedoms. I would be sorry to see it disappear completely, unless we get a quid pro quo.

Actually I don't think it is of very much importance, because probably this power is dead anyway. The last reservation of provincial legislation was in 1961, and it was made plain then by the Diefenbaker government that it considered this should not have taken place.

The last disallowance was in 1943, and to my mind the Diefenbaker government, by refusing to disallow that outrageous Newfoundland labour legislation in 1959 drove the last nail in the coffin.

I should rather hope that somebody might make use of this to try and squeeze some satisfactory protection for fundamental rights and freedoms out of the constitutional conference.

MR. GREATHED: If I might just make a comment here, I think the intention was not to put in any element of bargaining at this stage, but simply to lay out a variety of various issues that we thought ---

DR. FORSEY: I don't like this anyway. This whole theory that there should not be any subordination is repugnant to me. On this point I am an unreviled, unrepentant John A. Macdonald conservative -- one people and one government, not five people and five governments; local government and legislatures subordinate to the Federal Government and legislature. I am firmly convinced this is not only what we had originally but what we ought to have. All the billows have gone over me, so to speak, and I am powerless to do anything now, but I want to raise the last cry of the expiring Tory party.

PROF. McWHINNEY: Are we on the second matter now?

PROF. SYMONS: Could I follow up Eugene's point? I think that in practice it seems to be a dead letter. I am not one hundred per cent convinced that it is an entirely happy situation, but I do think that in the process of negotiation it would be helpful not to begin by throwing this

away. This is something that might be useful.

MR. STEVENSON: This is the Federal Government's position now.

DR. FORSEY: Do they want this out?

MR. STEVENSON: No, the Federal Government have said almost what you have said: "You agree to entrenchment of fundamental rights, and we will agree to the removal of disallowance".

DR. FORSEY: I am delighted to hear that. It enhances my already very high opinion of the Prime Minister.

MR. STEVENSON: This was not looked on very kindly by the provinces against entrenchment.

PROF. McWHINNEY: I thought Don was saying the Federal Government will give up reservation and disallowance gracefully because it does not want them, but it will likely get a concession for it. Isn't that your point?

MR. STEVENSON: It wants a concession for it.

PROF. McWHINNEY: Yes, if you buy the Bill of Rights, we will agree ---

MR. STEVENSON: We will leave the Federal Government to bargain for that quid pro quo when the Ontario Government itself

has not taken any strong stand in favour of entrenchment.

PROF. McWHINNEY: Is your admiration of the Prime Minister still increased on that basis?

PROF. MEISEL: Has Ontario anything else to give away?

PROF. SYMONS: I think Ontario's interest is pretty close to that of the Federal Government's in this process on that point.

MR. STEVENSON: The Ontario position has not been that close because of the fact that the Ontario position on entrenchment has not been that of the Federal Government.

PROF. McWHINNEY: If I may, as a footnote to history, I had correspondence with Mr. Diefenbaker at the time of this Newfoundland measure, and my conclusion is that he intended, in making the decision, that this would indicate the disappearance through desuetude of that power; that he disapproved of the legislation violently on the merits, but felt that the institutional power should disappear and consciously refrain from it.

DR. FORSEY: Incidentally, there is some support in "The Life of Joey Smallwood" for what I have always suspected and have reason to suspect, namely that Diefenbaker

hoped to get off the hook by hinting to the Lieutenant-Governor that he reserve the Bills for the signification of the Governor-General's pleasure, and then just let them lie, which would have been much the best thing to do.

PROF. McWHINNEY: That did not come up on this other point.

DR. FORSEY: No.

PROF. McWHINNEY: It was quite clear.

DR. FORSEY: No, that course was suggested to him by me as a matter of fact on behalf of the Congress, and I suddenly found out there was some reason to think that something of the sort had been done, and "The Life of Joey Smallwood" makes this very clear.

PROF. BRADY: There seems to be diversity of view as to what ought to be done about this.

PROF. McWHINNEY: I am in favour of it.

PROF. BRADY: Some are in favour and some not.

DR. FORSEY: I don't think it is worth any more discussion myself.

PROF. BRADY: We can go on to 2.

DR. FORSEY: Having secured my personal integrity.

PROF. BRADY: Head of State and Chief Executive.

PROF. McWHINNEY: I am curious about these terms. "Head of State" has become the term of art for the titular executive; but the term "Chief Executive" seems to be a sort of substantive description. I don't think the two terms sit very easily together.

PROF. BRADY: No.

MR. GREATHED: Just in explanation, these particular terms have been used in the category established, and we were simply following that category.

PROF. McWHINNEY: I wonder if you should not suggest striking "Chief Executive". It is completely misleading. One points to form of art, and the other to effective power. I would tell the Federal people: "Don't get your terms confused".

PROF. CONWAY: For the purpose of the record, Mr. Chairman, I want to register my objection to this, and since I have written at length about it and will be publishing something this year about it, and I sent a report to all members of the Committee a year ago, I will not elaborate on my objection.

PROF. McWHINNEY: May I ask why this is in, as a matter of interest? I

take it, as in all constitutional matters, the existing system remains until somebody positively moves to change it. Why does Ontario want to go on record? Is that a conscious policy decision?

MR. GREATHED: I think it is partly that if Ontario has to say something on the subject, if we are contributing as fully as we can to these discussions, I am not so sure that at this stage our political masters would accept anything else. They might.

PROF. McWHINNEY: It would seem to me somewhat un-Robartsian in the sense that I notice the Premier on the whole normally does not take positions of this sort. He waits until the problem arises, if somebody wants to move for a change.

DR. FORSEY: Quebec is pretty clearly doing so in this concoction we were looking at before.

PROF. FOX: Isn't the source of the difficulty that in explanation of 2 you make the choice lie between only two extremes -- constitutional monarchy and republic. Surely if there is going to be any change, it would be something less dramatic. You might have the Queen continue as the head of Commonwealth, and have a post with a variety

of titles in each of the members of the Commonwealth as the local head of state or chief executive.

DR. FORSEY: What would you call him, what George Washington wanted to have himself called -- Lord High-Mightiness?

PROF. FOX: You already have it in some Commonwealth countries; you have them called "President". It seems to me this is too dramatic a choice.

PROF. McWHINNEY: Some of the other language is funny. "The constitutional monarchy has been Canada's form of government throughout its history". I am not sure that is a correct description.

DR. FORSEY: How so?

PROF. McWHINNEY: Well, the more comprehensive term is "parliamentary system", or "parliamentary democracy", is it not?

PROF. BRADY: Constitutional monarchy implies parliamentary.

DR. FORSEY: I should have thought so.

PROF. McWHINNEY: Not necessarily. The Belgian system is a constitutional monarchy.

DR. FORSEY: Is it not a parliamentary system?

PROF. McWHINNEY: It is not the

classical parliamentary system, but it is a constitutional monarchy. That is the term of art the French textbooks use.

When you say "form of government", it seems to me in using it in the exclusive sense you are being misleading. You might say the constitutional monarchy has been an incident of Canada's form of government.

PROF. BRADY: An incident?

PROF. McWHINNEY: Something of that sort.

PROF. CONWAY: Would it not be true to say that the French monarchy before 1789 was a constitutional monarchy?

PROF. McWHINNEY: Yes, it was formally limited by the Estates General. The constitution of the German Empire was constitutional monarchy, modified only by the Reichstag. In other words, I think it is rather inelegant.

MR. GREATHED: I think the discussion illustrates the difficulty we have.

PROF. McWHINNEY: Why say anything?

PROF. BRADY: You can have constitutional monarchy and parliamentary ---

DR. FORSEY: Why not say "parliamentary monarchy", what is left of it?

PROF. McWHINNEY: Parliamentary democracy with monarchical head of state.

DR. FORSEY: No, it has not been a parliamentary democracy since the beginning; it was a limited franchise. The women were out of it altogether and so were other people.

PROF. CONWAY: John A. Macdonald said specifically it was not a democracy.

DR. FORSEY: Oh, yes, they were horrified about the idea of democracy.

PROF. McWHINNEY: It could still be a democracy without the women, of course.

DR. FORSEY: Parliamentary democracy, that is why constitutionally it is more poetry than practical. It is like the judges reading back into the preamble of the British North America Act, "Great Britain was a democracy in 1867" -- my eye and Betty Martin!

PROF. CONWAY: Specifically the Fathers of Confederation said the Canadian Union was not a democracy.

DR. FORSEY: They were insistent that it was a monarchy, exceedingly so; and none more so than George Etienne Cartier, thank God, repeatedly, to the annoyance of the Americans.

PROF. MEISEL: I don't want to go around nit-picking here, but if we do I would like to make my contribution. In the fourth line the word "thus" seems to me

to be quite unnecessary, since this sentence really does not follow from the previous sentence in any way.

MR. GREATHED: I have made a change to this.

PROF. McWHINNEY: It is a funny paragraph. You recite the internal form of government, then the Statute of Westminster business; then you get into what Harold Asler called constitutional folklore. It is a nice cocktail in the end, but it is somewhat a non sequitur type of proceeding.

MR. GREATHED: I think the difficulty is in trying to summarise an explanation and trying to get something into two brief paragraphs.

DR. FORSEY: The meaning is tolerably clear, I think.

PROF. SYMONS: Mr. Chairman, I would like to suggest one point. I think this is not the time or place for an elaborate discussion in these few sentences of the merits or demerits of the Crown; but I think when you are noting one or two only points about the Crown that it is important to say something about its relevance to the distinctive character and historic identity of Canada as a separate, political nation in North America. If there is an

argument for the Crown of Canada it is vis-à-vis the United States, without perhaps saying it quite like that.

PROF. BRADY: Let us say "historic heart", or something.

PROF. SYMONS: Sure. For me this is why we have a Crown. It is a symbol of the historic identity of English-speaking Canada and, to some extent, French-speaking Canada. I think if you are looking for reasons (though I am not suggesting you need to) that is the obvious one and it is worth putting in.

PROF. McWHINNEY: It is a better statement than this highly defensive explanation, this second sentence of paragraph one and the 1926 Statute of Westminster and all that, because that does seem to imply a progression then on to the complete abolition. It would be a better, more felicitous statement.

DR. FORSEY: Incidentally, it is rather amusing (not in connection with this) but in Quebec some of the Johnnies who are strong on poetry and grammar and their flowing phrases and all that in the Constitution, are most anxious to remove from the existing constitution anything of the sort. I won't repeat it all, but all the

symbols are there with all the emotional content that they have -- freedoms slowly boiling down from precedent to precedent, and putting in something else of their own invention. That is by the way, however.

PROF. BRADY: Perhaps enough views have been expressed on 2. 3?

DR. FORSEY: Again, "Chief Executive".

PROF. McWHINNEY: Yes, and the explanation is rather a funny statement there. I presume it means:

"Recognise the fact the Governor-General is appointed by the head of State of the Commonwealth on the advice of the Prime Minister of Canada of the day".

MR. POSEN: If one reads the proposition that went before, that the monarch continue to be the head of State ---

MR. McWHINNEY: You have got two heads of State, using the term as a term of art. You have your Canadian head of State, who is the Governor-General, and you have your Commonwealth head of State.

DR. FORSEY: No, because what we have been saying on page 2 is the head of State of Canada, surely? On page 3 we are talking about exercising the function of head of State in Canada.

PROF. McWHINNEY: The term in fact is a very conscious term of art, and in fact there are two heads of State -- the Canadian Governor-General and the monarch.

DR. FORSEY: I wouldn't say so. I would say the Queen is head of the Commonwealth, and she is also head of the Canadian State. She is Queen of Canada and head of the Commonwealth.

PROF. McWHINNEY: What is the term you are using for Governor-General, then? What descriptive classification?

DR. FORSEY: He is the representative of the head of State in Canada.

PROF. McWHINNEY: This is a conference operating with special definitions then.

DR. FORSEY: I have always understood that it was the classic definition.

--- Mr. Ian Macdonald rejoined the meeting and took the Chair.

PROF. McWHINNEY: No, the Governor-General is head of State. Who was working up the glossary of terms, somebody in the Federal Secretariat?

MR. GREATHED: In which respect?

PROF. McWHINNEY: This glossary of terms, "Chief Executive".

MR. GREATHED: These were established by the Secretariat.

PROF. McWHINNEY: The Federal?

MR. GREATHED: No, by the secretaries to the whole Conference.

PROF. McWHINNEY: I am not querying the categories, but merely the terms used as labels for them.

PROF. BRADY: I suppose we cannot draw up a glossary in appropriate terms. We could do it, but ---

PROF. McWHINNEY: No, but when you are dealing with technical matters and you have technical terms with technical meanings, it is sometimes helpful to use them.

PROF. BRADY: We have diversity of views as to what the terms should be.

MR. STEVENSON: These are the terms used by the Federal Government in its propositions. At least, I thought that is where you stole the phrase.

MR. GREATHED: No, the phrase was stolen from the category established, I confess without too much thought.

PROF. BRADY: Our chairman has returned so I hand over.

THE CHAIRMAN: Thanks very much. I am sorry to have delayed further than I thought. I gather you are on 3.

PROF. McWHINNEY: On 4, are we not?

PROF. BRADY: We have exhausted 3.

THE CHAIRMAN: "Constitution of the
Central Government - Head of State and Chief --" ---

PROF. McWHINNEY: "Chief Executive".

PROF. FOX: I just wondered here,
Mr. Chairman, whether there should also be a
clause establishing a period of tenure. It
seems to me that might be important and I
don't think it comes in anywhere else, does it,
Ed -- the term of office for the Governor-
General? I don't think it is included in this
draft anywhere else.

MR. GREATHED: No.

DR. FORSEY: What would you put in,
"liable to be removed by Order of the
Governor-General in Council for incapacity,
malfeasance in office, mental infirmity"?

PROF. McWHINNEY: And subject to
the Landreville rules of interpretation as
to what that means.

PROF. FOX: No, it strikes me that
the functioning of the office might be
improved if our Governors-General were
in power for a longer period than they are.
If we were discussing it, I would suggest
ten years with a possible renewal period,
because I think we need really continuity
with one individual.

DR. FORSEY: What happens if the chap goes off his rocker?

PROF. FOX: There is a clause about removal here somewhere.

PROF. McWHINNEY: You can make it a more significant office with a longer term. Is that your intention?

PROF. FOX: That is really my intention. I think one of the problems in Canada is that many people do not know who the Governor-General is; he has no particular significance.

PROF. McWHINNEY: Many think that is a good thing, of course; it de-emphasises the office. What you are really making is a policy choice in terms of the importance of the office vis-à-vis the Prime Minister, that would get into a longer term.

PROF. FOX: It may touch on that.

PROF. BRADY: Five years makes him very much a transient.

PROF. McWHINNEY: Yes, and ten years is an institution in himself.

PROF. FOX: There is no term laid down in the B.N.A. Act at the moment, no term for the Governor-General; and I wonder, if you are talking about something like his being a Canadian citizen, why shouldn't you talk about the length of tenure of office?

MR. GREATHED: Paul, I wonder if it would come on page 6?

PROF. FOX: You know, I am not suggesting it is important here. I just want to raise it as a general matter for consideration at some point.

MR. GREATHED: All right.

PROF. CONWAY: I think Paul has a very good point, because it is clear historically the term is limited to five years because English noblemen wished to get back to England after five years to their estates and life in London. The office being continued now under its reformed constitution, I think all sorts of new considerations such as Paul brought up apply very much.

PROF. McWHINNEY: Montreal noblemen may wish to get to the slopes of Montreal.

THE CHAIRMAN: To Toronto.

MR. STEVENSON: We have not made a suggestion about capital yet.

PROF. CONWAY: He may be, as Professor Brady says, just a transient. If he is ^{not} going to have any significance, why have him; why not have the Chief Justice do the constitutional ---

PROF. McWHINNEY: Because the Chief

Justice has work to do; he has bad liver, too.

PROF. SYMONS: I think it is a good point and it is worth thinking about.

PROF. McWHINNEY: Putting in the term of office.

PROF. BRADY: And a longer term.

DR. FORSEY: I suppose you have got that covered in 6.

THE CHAIRMAN: It is generally agreed it could be in either 5 or 6.

PROF. BRADY: We leave that to the Secretariat.

MR. GREATHED: Was there some point about the grounds of removal?

PROF. McWHINNEY: I think that is under 6.

THE CHAIRMAN: 6 is the place.

MR. GREATHED: It is not covered by this scholarly term "moral turpitude"? Would that be satisfactory? (Laughter)

PROF. McWHINNEY: It has no longer legal meaning. That ceased long ago.

PROF. SYMONS: That is not purely a scholarly term nowadays. Mr. Chairman, may I raise one point. I am very much in favour of the intent and spirit of the notion that the Governor-General should be a Canadian citizen, but I am just wondering if it is not pretty crude. Are you shutting

out the idea, which I suppose is a long shot now but I think it was a pretty liberal one and international one; that on occasions Commonwealth countries might possibly swap Governor-Generals? I think it would be very salutary for Canada to have a governor-general at some point from India or Pakistan.

PROF. BRADY: Or even Australia.

PROF. SYMONS: You know, you are closing the door by doing this. Are you sure it is necessary? Are you in favour of the spirit? I wonder if you want to close the door.

MR. GREATHED: Would your comment be covered by changing the "must" to "should"?

PROF. McWHINNEY: You are getting into the minutiae of constitutional law. Do you really want to have a provision on this? If a case arises -- such as, you remember, Franklin D. Roosevelt, Jr., -- you can always get a court ruling if there becomes an agonising situation.

PROF. BRADY: I would question whether you need to.

PROF. McWHINNEY: Frankly, does it weaken Ontario's case to come up with all these funny little things? Is it appropriate in this international age?

MR. STEVENSON: The Federal proposition to date has been real minutiae.

PROF. McWHINNEY: Why should we play the same game?

PROF. SYMONS: I really thought it was unbecoming in the late twentieth century.

PROF. McWHINNEY: It is narrow nationalism, is it not?

PROF. SYMONS: It really is.

PROF. MEISEL: I went through precisely the same form of thoughts, Mr. Chairman. Then I thought one job in addition to ceremonial functions of the Governor-General that is important is the question of an election in which there is no clear winner, where he may have to negotiate with leaders of three or four possible parties.

I wondered whether, you know, as distinguished a person as Mr. Nehru or some very distinguished Australian or Indian, could really perform this kind of job with the sensitivities that it requires. I thought: "Well, it may be parochial to insist that he be a Canadian, but there may be moments when what you really want is a good understanding of the real situation."

PROF. McWHINNEY: That operates, surely, in your discretionary powers in the appointing process, does it not, John?

PROF. MEISEL: Yes, it does. I would be inclined to leave it out, the whole thing; in other words, to leave 4 out.

PROF. McWHINNEY: You know this provision in the American Constitution that you have got to be a natural-born American citizen: I think the general view of constitutional lawyers is that these restrictions are a pity; that they come in in a fairly, if one could call it, nervously national period of one's origin, but you really do not need them in extra protection, and sometimes they are a nuisance.

DR. FORSEY: What you have on page 4 is really an attempt to sum up the present practice, with which I assume the Government of Ontario is reasonably satisfied. It is not going to go to the States for something different. It is presumably open to conviction, and I think this is what is going to happen. I think he is always going to be a Canadian citizen, and I think you are going to have the alternation of English-speaking and French-speaking.

PROF. BRADY: You leave that, after all, for opinion and custom and so on; you do not need everything down.

THE CHAIRMAN: All right, I think we have the prevailing sentiment.

PROF. McWHINNEY: That is an Indian approach to constitution making, shoving it all in.

PROF. BRADY: Filling paper.

PROF. McWHINNEY: Yes, filling paper -- a 350-page long constitution. Admirable people but ---

DR. FORSEY: On 5, all I hope is that whoever tries to translate this in terms of constitutional law, will know very well what he is about.

"The functions of the
should
"Governor-General/be defined
"in the written constitution and
"should be limited to the present
"practice."

I hope they know what the present practice is. I am not by any means free of obscurity.

PROF. McWHINNEY: Deceptively trite, this statement.

DR. FORSEY: I venture to say a lot of constitutional lawyers will say: "I am throwing in my hat"; and as for

defining them, in all probability I don't think you can considerably list the functions of the Governor-General.

If the intention is merely to make certain that certain things in the present Act which appear to be capable of being performed by the Governor-General alone, without advice of his Council, should be straightened out, the terms of the Act should be made to accord with practice, that is well enough; but if you say that "developments over the past hundred years have hindered the independent exercise of the power by the Governor-General", I am afraid this is one of the things where you simply cannot get the thing down in sufficient detail and with sufficient flexibility to make it satisfactorily workable. I think there are some things here that are best just left to custom and development of custom. This urge to get things down in black and white can be shoved too far. It can prevent you then from adapting your constitution to a new situation.

One of the things that comes up especially in this connection is the fact that sometimes functions change

because the situation to which they were originally a response disappear. Then, by George, it comes up again in the same or a new form.

Take for example the party situation at Confederation. There were a tremendous lot of loose fish, shaky fellows. After each election you got the Globe giving one list of members as Liberal and the Mail giving another list which included as Conservatives some of the people who were shown on the Liberals. These loose fish swam back and forth and you had a series of defeats of Macdonald's government in the House of Commons in consequence.

That sort of thing was quite characteristic of mid-nineteenth century England and also Canada. Then with the development of a broad, more democratic electorate, you had much greater rigidity of party lines, and so you got majority governments instead of (very often) minority governments, and the loose fish, shaky fellows, independent members, disappearing, and certain of the powers of the Crown therefore seemed to have disappeared; certain things were not happening any more. The practice, for

example, of waiting for a new House of Commons to pronounce judgment on the government gave way to the practice of resigning immediately when you were defeated in an election. Then you got to the point where these loose fish did not appear but loose schools of fish appeared. You had a third party, a fourth party, and nobody got a clear majority. Your old practice began to come in again and various people said: "This is highly unconstitutional". The answer is: "No, it is not; it is perfectly constitutional. You are going back to previous practices", because the circumstances which called forth the old practices had re-asserted themselves, even if in slightly nominal form.

This seems to provide a beautiful example of the flexibility of convention, and something which it would be a great pity to cut off by going into too much detail in fundamental law.

PROF. BRADY: I would agree with Eugene and add that the full functions of the Governor-General for the Crown are indefinable. It depends on the individual's personality, outlook and so on; he is a symbol, in a sense. He will do

things to give reality to the symbol that perhaps his neighbour would not do. You have got to think that he has scope, as it were, to do that.

There are one or two functions, of course, that should be clear in the constitution, and they are usually in the practice and convention anyway, but I do not like quite the defining of the functions.

PROF. FOX: Mr. Chairman, I agree with what has been said, and I was thinking about this in some detail. I think if you do want to pursue it, it is easier to do if you distinguish between functions which Dr. Brady was talking about in reference to the Governor-General being the symbol of the State and acting as exemplar of the country's voice and sort of chief political conciliation officer at difficult moments in the operation of the constitution; then you can also look at the powers, and here they break down under prerogative powers such as the invitation to somebody to be Prime Minister, and selecting among potential successors if the Prime Minister dies or is incapacitated.

Then you come to statutory powers, and here he has statutory powers as an

individual under the B.N.A. Act. I went through these and I was surprised to discover as many as I did. There were sixteen, seventeen or eighteen times he is mentioned in specific clauses, and I have noted these.

Then, of course, there are his statutory powers as member of the Privy Council, the Governor-General in Council.

DR. FORSEY: Would that not be as part of the entity called "Governor-General in Council"?

PROF. FOX: Part of the entity. There were eight here that I cannot identify by clause in the B.N.A. Act. So that I think this needs a great deal of careful thought if you go into it.

DR. FORSEY: It certainly does. There is also the whole question of the reserved power.

PROF. FOX: That is right.

DR. FORSEY: Whether there are any circumstances in which he can refuse the advice of his ministers.

When you come to prerogative powers, I hope everybody who is dealing with this knows what the word "prerogative" means. A great many of my students don't. I should have thought that a great number

of prerogative powers are already clearly stated in the Letters Patent. When you say the B.N.A. Act gives the Governor-General wide powers -- the B.N.A. Act and the Letters Patent; because a string of things are in the Letters Patent that are not mentioned in the British North America Act at all, and they are strictly prerogative powers, they are part of the original discretionary power of the Crown, a great deal of which was there before there was a parliament to make any statute.

PROF. McWHINNEY: The comparative experience is that the modern trend to try and define these things represents no advance over the prior situation. It all becomes subject to interpretation again, and it is an exercise really in futility to try and define this, I think.

MR. GREATHED: I think, Mr. Chairman, what is behind certainly a lot of the housekeeping points that Mr. Stevenson mentioned earlier and particularly on this whole area, is the idea that if (I emphasise "if") a new written constitution is produced in this country, the idea of it being a document which is useful for educational purposes, the idea of it being a document which reflects the

political workings of the country and so on, is very much in the minds of people who are looking at this particular question.

PROF. BRADY: It is one good reason why it should not be too long, then.

MR. GREATHED: Yes.

PROF. McWHINNEY: You will end up with an Indian constitution, and that is a disaster.

PROF. BRADY: A powerful example.

PROF. McWHINNEY: In any case, futile in terms of trying to cover future situations in this area.

DR. FORSEY: Also, you want a constitution that will work. If it is a choice between poetry or ideals or that kind of thing (and I don't want to sound too contemptuous of that) but if it is a choice, let us say, between memory work for school children and a constitution that will work, I think we have got to opt every time for a constitution that will work. If you are going to try and fix it up so that kids will thrill to it and all that, that is fine, provided you do not make it fall down and break its neck. Watch out.

PROF. SYMONS: Mr. Chairman, I would like to question, just really in a quizzical way, the second assumption or the second point in this main proposal, that it should be limited to present practice.

I suppose I would agree with that in terms of public life as it is today, but if it undergoes marked changes in other directions we might perhaps see a different role or new roles for the Governor-General.

DR. FORSEY: It underlines what Professor McWhinney and I have been saying, and Professor Brady. If you try to go into all sorts of minutiae and say that the Governor-General shall blow his nose at 9 o'clock every morning, and at nine-ten he shall get himself a fresh pocket handkerchief and at nine-fifteen he shall walk down the hall for a certain purpose, you are going to get an inordinately long document, make the poor man's life a burden, and not make the working of the constitution in Canada any more satisfactory.

THE CHAIRMAN: I think we have the sense of that point.

--- Mr. Gathercole joined the meeting.

PROF. FOX: The sense?

THE CHAIRMAN: Omit! Now we come to Item 6 -- death, incapacity or absence.

DR. FORSEY: Is it not the present practice to provide that the Chief Justice shall exercise the functions of Governor-General, is there not something in the Letters Patent about that?

PROF. McWHINNEY: It is surely in the constitution. It is in most common law constitutions. It is one thing the colonial drafting office used to push in.

MR. STEVENSON: The Letters Patent constituting the office of Governor-General provide for an administrator to take office if the Governor-General is ill or absent or the office is vacant.

PROF. McWHINNEY: Is there not something in the British North America Act?

DR. FORSEY: I don't think so, not in the Act.

PROF. McWHINNEY: It is in the Australian.

DR. FORSEY: The Governor-General gets into the act, I was going to say -- is in the Act only as something taken for granted. There is nothing about how he is appointed; it just says "the Governor-General shall do" such and such. There is

provision for deputies also, but I think that is in the Letters Patent.

MR. GREATHED: That is also in the Act.

MR. STEVENSON: Section 10.

DR. FORSEY: Yes, that is right, it is in the Act; it is one of the few things you do get in the Act; but in the Letters Patent you have the whole business about his appointment and whole range of his powers; and I do not think it was in the original instructions but I think in the Letters Patent about the Chief Justice or, in his absence, the senior puisne judge of the Supreme Court of Canada, and it is spelled out.

PROF. FOX: Section 14, though, in the B.N.A. Act, I think, covers it.

MR. GREATHED: Yes, we refer to that in point No. 6 on the second page of this proposition.

PROF. FOX: On the second point under "Explanation", I think you need after "incapacity and absence" some such clause as "and ability to declare the same". In other words, you have got to establish this right to decide that the person is incapacitated.

DR. FORSEY: Yes, but presumably

that is implied by the statement "defined by statute". It would not do much good defining it unless you said who was going to say when it happened. There should be something about it there, but I thought it was implied.

PROF. FOX: This is one of the major considerations when the Americans drafted their amendment of this particular point.

DR. FORSEY: Presumably we have more sense than that.

PROF. FOX: But they put it into the constitution.

MR. GREATHED: Can we get advice from the Canadian Medical Association on this point?

DR. FORSEY: When he is dead? In 5, why "Lieutenant-Governor or Provincial Chief Justice", especially why "Lieutenant-Governor", who, incidentally, I think, there was some suggestion they are going to be appointed by somebody else, (I don't know); but it struck me as odd to go bunging in the provinces at this point. I suppose all the other justices of the Supreme Court might be carried off by some other awful natural disaster.

PROF. MEISEL: Or all may be

in the same airplane.

DR. FORSEY: They wouldn't allow that, because the Cabinet does not travel in one airplane now. The Diefenbaker Cabinet did, the first time it went down to Halifax to meet the Queen, and Bob Bryce nearly went crazy thinking about what could happen with all in one aircraft. I learned this when I was down there as an honorary pallbearer. Gratton O'Leary and I were a couple of supernumeraries and Donald Fleming told us, "Bob will never allow us to go in one plane any more. He has had it". Presumably the Registrar of the Supreme Court of Canada would decline to allow them to go in one plane.

PROF. MEISEL: He may not be such a pessimist.

PROF. McWHINNEY: The American Government has a rule, does it not, of no more than three cabinet ministers. I wonder, do you really want this? I suppose it would go into one clause of about ten or fifteen words in the new constitution, but again ---

PROF. MEISEL: Mr. Chairman, there is one thing that keeps running through my mind, which may be irrelevant,

but I do not think it is quite. It seems to me that it would be foolish to take out all the things that probably should ultimately not get into the final draft of whatever changes are made. I think there have to be completely insignificant topics of conversation -- I am serious -- I think you can't only negotiate about matters that really count, but you have to allow yourselves a chance to waste time. I think we should keep this in mind and leave in a certain number of facts that, you know, everybody knows are not that significant, but let us talk about them for a while and give tempers time to cool and new alignments to form.

MR. STEVENSON: I think there is a definite point that it may be an advantage, even though some of these propositions do not find their way into a written constitution, to having them there to provoke a discussion on what the practice should be.

DR. FORSEY: For the purpose of educating Quebec ministers and officials, if no other, some of whom I suspect are under a series of the most extraordinary misapprehensions of the present situation. There are plenty of English-speaking people

are, I know that.

MR. GREATHED: I thank Mr. Meisel for that interjection, because this was very much in our minds. A lot of this clearly cannot find its way in.

MR. STEVENSON: Does this mean we should not omit 4 and 5?

PROF. MEISEL: I don't care which ones you take. I was thinking even about the term of office of the Governor-General, which I personally think should not be put in that kind of document, but if it is a useful thing to discuss and gain time, why not?

PROF. BRADY: Where do you draw the line though? You surely have to draw the line somewhere.

THE CHAIRMAN: I think there is a different character of opinion expressed about point 4, which was addressed in part, as I understood the conversation, to the appropriateness of the sentiment, quite apart from the retention of the clause; but 5 and 6 are perhaps in a slightly different category. I think there is a bit of the question about substance in 5, too, raised by Professor Symons about the term "limited to the present practice". At least, I think it was you, Tom, who mentioned that.

PROF. SYMONS: Yes, it was. I

think it might be useful to have some discussion. It depends on what time there is available to the Continuing Committee of Officials.

THE CHAIRMAN: Well, in this exercise here we are not seeking to come to unanimous views. We are seeking to be guided by your advice as to whether these things are worth developing, carrying forward, or disposing of and so on.

DR. FORSEY: I would very seriously question this business of having the lieutenant-governors in here, even for conversational purposes, or chief justices, either; especially if you abolish the proposition on page 15:

"The titular head of the
"executive branch of the
"provincial government should
"be appointed by the Prime
"Minister of the province".

Are you going to have an interim governor-general then who is appointed by the prime minister of some province? Especially as the people who are likely to be appointed lieutenant-governors may often, and particularly in some of the smaller provinces, leave a great deal to be desired.

PROF. McWHINNEY: This is true now, is it not? I mean, it is one patronage system for another.

DR. FORSEY: But it is probably worse, because if the Province of Prince Edward Island were appointing this lieutenant-governor, the probability is that he would be some small-time politician.

PROF. McWHINNEY: This is probably true already. I don't know the incumbent.

DR. FORSEY: Even so he would probably be at least as bad and, I should think, worse. In any event, you do not want to have somebody of this calibre suddenly pitch-forked into the office of governor-general, quite possibly at the moment when some crisis is boiling up like picking a new prime minister or a dissolution or something of that sort.

PROF. McWHINNEY: Frankly, while John Meisel's point is a very important one and I suppose if the Ontario delegation understands this, well and good; as long as one is not responding to somebody else's strategy. You are putting in the trivia to divert attention from substantive issues.

THE CHAIRMAN: Let us have some

classifications here. I think it is one thing to retain clauses which are questionable in terms of content, but I hope we are not going to retain anything that we all would agree was trivial.

PROF. FOX: I do not think this one is trivial; I don't think No. 6 is trivial, and I think it should be in; but I wanted to agree with Eugene's point about lieutenant-governor.

PROF. SYMONS: Mr. Chairman, I share the feelings of Dr. Forsey and Professor Fox. I think it should be in, 6, but I would take out the lieutenant-governors.

DR. FORSEY: They are provincial chief justices who are also to be appointed under the new dispensation or under some new dispensation by the provincial government. Anyway, I suggest it ought to be thought about a little bit. I do not think it is a self-evident proof.

THE CHAIRMAN: All right, I think we have that point. Page 8 -- "Written constitution should clarify the roles."

PROF. MEISEL: Mr. Chairman, there is an ambiguity in item 1:

"It should define it and make

"explicit that only those privy

"councillors who are members of
 "the Cabinet should be able to
 "proffer advice?"

I don't know what "proffer advice" means, but it seems quite possible that if no party wins in an election, there are all kinds of privy councillors around who were members of a previous cabinet, not the immediate one (say, three cabinets back) who should be consulted, who have to be consulted, and who may very well proffer advice as to whether or not they can get a majority in the House of Commons, and I think to rule them out this way is quite wrong.

DR. FORSEY: Yes, and it is not merely even ex-privy councillors. I think it is well established that when there is a situation where the Prime Minister dies perhaps, or something of that kind, both the Crown and the Governor-General may consult various people. Former Governors-General used to consult old Todd, the librarian at Ottawa, or Sir George Brennan and it was quite regular, because they were quite eminent authorities on constitutional practice. I do not think the idea is by any means completely dropped out. I feel it is still possible for the

Governor-General in moments of crisis to consult various people that he might think may be able to enlighten him on certain aspects of the situation.

PROF. McWHINNEY: If this is the intention, a lot of them could. It however preserves, on some constitutional authorities' views, the constituent survival of a former constitutional condition. Is it clear that one wants to retain this dual apparatus, if you wish, of cabinet and privy council, because it seems to me it is implicit now in proposition 8.

PROF. FOX: There is some confusion about this. I think the first thing is in the main statement the word "roles" which I think a very ambiguous word.

PROF. McWHINNEY: Yes.

PROF. FOX: Then there is the point you raised, Ted, the distinction between the cabinet and the ministry. The first sentence in explanation paragraph 2.

It is interesting that when the House of Commons debates every Wednesday, for instance, the cabinet and the ministry are distinguished. The ministry

is the generic term, and then the cabinet is listed and the parliamentary secretaries are listed.

DR. FORSEY: They are back in the ministry, are they? They were out before the last one.

PROF. FOX: Well, in their practice, the people who edit the House of Commons debate draw the distinction.

DR. FORSEY: They always used to be in and then they went out.

PROF. McWHINNEY: The privy council effectively (maybe it should not have) effectively it is one part of the constitution that has really lapsed into desuetude as a constitutional custom. What you just have is a purely formal act left. It seems to me the explanation seems to imply keeping this alive.

DR. FORSEY: The privy council as such has one small use in a country which has got rid of most distinctions, except now the Order of Canada, to confer a distinction upon eminent citizens who usually are at an age where they can no longer perform any governmental function or who have never been much for politics. You have quite a string of people who are privy councillors as a

mark of honour. It is the custom to make the Chief Justice of Canada a privy councillor; it is the custom to make the Speakers of the Senate and the House of Commons privy councillors at or shortly after their retirement. It is the custom to make people like, the last instance, of course, provincial premiers and leader of the opposition privy councillor on occasions. Former party leaders like John Bracken have been made privy councillors; even visiting dignitaries from other parts of the Commonwealth.

PROF. CONWAY: Under what circumstances are members of the Cabinet made privy councillors? Are all members of the Cabinet?

DR. FORSEY: They have to be, they have to be privy councillors. The Cabinet is merely a committee of privy council.

PROF. McWHINNEY: A different approach though to this, if you wish, could strike the Privy Council completely from the constitution and simply list the Cabinet. The honorific part, the title, could certainly be retained quite independently, much like in the Lords.

Judges, of course, very often.

PROF. MEISEL: Should the constitution actually clarify the roles of the Privy Council?

PROF. McWHINNEY: I wonder if we couldn't strike it. One suggestion might be to strike the Privy Council from the constitution and define the role of the Cabinet.

DR. FORSEY: I suppose the intent is to make it clear that any Tom, Dick or Harry who is a member of the Privy Council, member of a late Cabinet, cannot suddenly present himself, like the Duke of Shrewsbury did to Queen Anne, and declare his right to advise the Crown as privy councillor.

PROF. McWHINNEY: Why not eliminate this?

MR. GREATHED: Might take a lot of questions out of university exam papers.

DR. FORSEY: Theoretically M.J. Caldwell could walk into the Privy Council Chambers at a Cabinet meeting and insist on his legal right to be there.

PROF. McWHINNEY: At the Federal level it used to be, what is it, Judy LaMarsh and one other cabinet minister for the formal act of signing legislation?

DR. FORSEY: Oh no, the Orders-in-Council, by custom, there is supposed to be a quorum of four present for the passing of an Order-in-Council. There is no legal basis for this, and it has not always been followed in practice.

PROF. McWHINNEY: It was usually Judy LaMarsh in the old government, was it not?

DR. FORSEY: She may have taken it down to Government House for him to sign.

THE CHAIRMAN: Ray, what is our practice in this respect of signing Orders in Council?

MR. FARRELL: Once they are passed by Cabinet, the Clerk of the Executive Council, or his assistant, finds out when the Lieutenant-Governor is going to be there, and he is usually there on Thursday. He goes over to his office. Everyone else has initialled and signed it. There is the original docket signed by the Minister, the original Order signed by the Minister concerned, and then they are put in an Executive Council docket and they are signed by the Minister who is signing as Chairman. Usually, of course, not Mr. Robarts, but it is one of the other ministers. Mr. McIntyre initials them,

Jack Young, the Secretary of the Cabinet, or Mr. McIntyre initials them, sends them to the Clerk of the Executive Council. Then he takes them down to the Lieutenant-Governor, who signs the docket, to be official.

PROF. BRADY: Mr. Chairman, I suggest that we do not seal the fate of the Privy Council today.

PROF. McWHINNEY: There is a romantic among us.

THE CHAIRMAN: I think we have something to chew on out of that.

MR. GREATHED: Unfortunately.

DR. FORSEY: I am a little inclined on 9 to wonder whether 2 is advisable to put in: "However, if no such changes can be agreed upon, then the Upper House should be abolished."

PROF. McWHINNEY: That would dispose of most of the constitution, would it not, if applied all along the line.
(Laughter)

PROF. SYMONS: This is puzzling, as I read it, and it seems to me to say (perhaps this is what was intended) that it is better to have no Upper House than our Senate as presently formed. I don't know that I feel that strongly about the Senate.

MR. GREATHED: I think that is how we read the Prime Minister's remarks when he was here earlier.

DR. FORSEY: I am going to suggest I think it is a little academic, because I suspect if you do not get any kind of reform you will have a very small number of people asking for the total abolition.

PROF. CONWAY: Also it is an immense constitutional change rather casually introduced.

PROF. MEISEL: That is what I like about it.

DR. FORSEY: Something slightly sophomoric for freshmen.

PROF. McWHINNEY: It is a shock to the preceding articles we have been looking at, isn't it?

MR. GATHERCOLE: Well, I suppose until people are faced with the prospect of having some of it abolished, they are not prepared to recognise the process by which it may be amended.

PROF. SYMONS: Just to carry the matter further, I for one, while vigorously favouring a good deal of change for improvement in connection with the Senate, would not think it better to abolish the

Senate in its present form.

Just in recent months the work it has done which the Commons has been quite incapable of doing, considering national science policy, is enough to justify a Senate for a decade. This is something that the House of Commons simply has not the time, or indeed the personnel, I am afraid, to deal with. So I would not, for one, favour abolishing the Senate rather than keeping it in its present shape.

DR. FORSEY: I am inclined to think that any change you make in the Senate will probably do something worse.

THE CHAIRMAN: I cannot imagine that any prime minister who ever had to shuffle a cabinet would favour abolishing the Senate.

PROF. MEISEL: On the other hand, this seems to be a case where I think, on the whole, it is a useful thing but you could live without it, but there are other things we could not live without.

If the situation becomes such that there is very strong clamour for its removal, I would not, as an Ontario citizen, have forty fits if I found ourselves saying: "Well, let us forget about the Senate".

DR. FORSEY: The point the Chairman made brought to mind what was said by a student of mine last year on his final examination:

"The existence of the Senate
 "enables the Prime Minister,
 "when forming his Cabinet, to
 "get rid of aged but eager
 "dead-wood by putting them to
 "pasture in the Senate".

MR. GATHERCOLE: Of course, if you argue that the Senate is an acceptable haven for individuals who may be removed from office in order to improve the role of the Lower House and government, then you ought, it seems to me, by logic also to contend that the provincial legislatures ought to have such a vehicle in order that they may achieve the same purpose.

THE CHAIRMAN: Or else have some access to the Senate.

MR. GATHERCOLE: That might scatter things around, distribute the fruits.

PROF. SYMONS: I for one would be quite prepared to argue that. I think it would be a marvellous thing if Ontario had an Upper House.

PROF. FOX: You are not ready to retire yet.

MR. PERRY: Bishops should be honorary members.

THE CHAIRMAN: Might even not just confine it to politicians, but get the odd civil servant.

MR. GATHERCOLE: Perhaps the answer is to just make available to the provincial governments the opportunity of elevating some of their distinguished past members to a place where they can continue to make a contribution.

PROF. FOX: That comes up really under Item 12, does it not?

MR. GATHERCOLE: Yes, it comes up later.

MR. STEVENSON: It would be interesting, Mr. Chairman, if we had some other opinions on that general proposition, I think, which we read into Mr. Robarts' remarks, and on which two or three members have commented:- Does one accept the general statement that if you cannot improve the Senate, abolish it? We have now heard from at least a couple of members that they would disagree.

THE CHAIRMAN: Did he make such an explicit reference to the Senate?

MR. STEVENSON: That is the way I read a couple of things he said.

THE CHAIRMAN: I don't remember his being that sharp.

PROF. BRADY: Surely, you must not read too much into that statement. It does not mean, or it need not mean, and I am sure it does not mean that Mr. Robarts concluded it was impossible to revise the Senate.

MR. STEVENSON: Oh, no.

PROF. BRADY: It was merely an emphatic way of saying that it was necessary to have some change. I don't think we should be arguing about it. I think there will be a Senate, after all. Whether we can reform the present one is a problem, and it is a difficult problem, more difficult than some think; but there will be, because after all the various units, especially the smaller provinces and so on, I think, will want a Second Chamber in which they have some kind of recognition. Even if their recognition is so tenuous as in the present Senate, still they are interested in it.

PROF. McWHINNEY: If the system of representation is changed to accord with the universal Federal practice (universal, that is, except for Canada) of letting the regional units participate in or control the method of appointment, then clearly this

province is interested in changing the nature of the Senate.

I would be very surprised if Mr. Robarts did not reflect this interest. It is an obvious one of any regional authority to want either to appoint itself or actively to participate on a joint basis.

If it helps him to get through to this, to put in such a Gaelic oracle proposition as contained in 9(2) well and good; if it does not, as Tom says, it is rather a dramatic step to be waffled into with all the casualness of the second sentence.

PROF. FOX: I think, Mr. Chairman, the Senate has performed some useful functions. The committee-work, as Tom says, has been very good in certain aspects in particular, and it would be a mistake to put it in this category.

DR. FORSEY: If you want to add something in there by way of Number 2 to look after what the Prime Minister seems to have said on this, could it not be shaded a little bit? It seems a bit abrupt the way it stands now -- "consideration should be given", or something of that sort.

PROF. CONWAY: I think, Mr. Chairman, among other things, this ignores the whole

body of literature in political theory on the subject of two-chamber legislatures and their values. I think it would be a grave error to dismiss it as this second sentence does. It sounds like something from the dialogue of Iolanthe. What we are doing here is taking a very historic issue in political theory and just brushing it away like that. I can't see that at all.

DR. FORSEY: If the Premier insists on having something of the sort in, can it not be shaded a bit?

THE CHAIRMAN: I want to see the reference to this text before I push this too much on the Premier's chair, because I do not recall him being that specific.

DR. FORSEY: I think this, if presented to the Continuing Committee, certainly might cause what might be called an abrupt jump on the part of some of the officials saying, "What?" -- just trying to make over the whole thing in the image of the constitution of Ontario.

PROF. BRADY: Why not abolish 2?

THE CHAIRMAN: Abolish 2 instead of abolishing the Upper House.

PROF. McWHINNEY: Or join 9 with 12, isn't it? In some ways there is a

logical sequence. If you strike 2 it seems to me that proposition 1 under 9 leads us logically into this detail proposition under 12.

THE CHAIRMAN: Yes, really we are making an assumption on 12 when we say categorically that it should be reformed to reflect more effectively regional interests, and that presumably says we think it is going to be retained in order to do so.

PROF. McWHINNEY: 12 is really what you are after, isn't it?

MR. STEVENSON: There was in the way the Federal people have classified it, a category called "Parliament" within the constitution of the central government, and this proposition was just put in to provide a definition as to what parliament is.

DR. FORSEY: Why not just put in the sentence and then explanation 1? It seems to me that is quite enough.

THE CHAIRMAN: All right.

DR. FORSEY: On 10 I want to put in a caveat on behalf of the Atlantic Provinces. There is a floor now. It is glutted by Canadians who put so much weight on it by growing and getting more populous and wealthy all the time, but there

is a limit now and we are entitled to our irreducible minimum.

I think there ought to be some recognition of the principle of the present section 51(a) there so that at present no province can have fewer members of the House of Commons than it has in the Senate. Perhaps this is overdoing it (I don't know), but some kind of safeguard for the smaller provinces in addition to what they may get out of a reformed Senate or the existing Senate, seems to me worth considering.

I should not want to foreclose the thing quite so abruptly as it is by the general proposition with which, of course, as a general proposition, everybody would agree.

PROF. FOX: It is also a question whether you want to preserve, although it is perhaps not as defensible, the 15 per cent rule that no province can lose more than 15 per cent of its number.

In other words, I think Eugene is right, that as this stands it looks very attractive, but when you think about it in the Canadian application it is not really historically relevant at any rate, and probably is not justifiable.

DR. FORSEY: The sudden, abrupt

drop that you would get in representation of certain provinces after a decade could be a pretty touchy thing. We have always had the same seven.

MR. GATHERCOLE: The other thing, Eugene, affording provinces with small populations additional representation, tends, it seems to me, to inhibit probably the consolidation of their jurisdictions into more viable regions, and I think you ought to have a look at this, because some of the smaller provinces may be better served if they were part of a larger regional area.

DR. FORSEY: Perhaps so.

MR. GATHERCOLE: But the fact that they have got this representation, a minimum number of senators, members of the House, militates against what is a very desirable and welcome consolidation of these provinces.

DR. FORSEY: You people up here have a great penchant (Quebec people especially) for trying to shove the Atlantic provinces all into one province. I suggest you mind your own business and we mind ours. After all, in 1867 you had to come down to ask us to rescue you from the mess you had got yourselves into.

MR. STEVENSON: The first draft of this proposition had all the limitations written in. We took it out, I think, partly for the reasons Mr. Gathercole has stated, that if we are thinking of starting from a new position, then there are quite a few advantages in keeping the constraints and limits in the Upper House rather than the Lower House.

PROF. McWHINNEY: What did you intend to say by this? You wanted to exclude the indirect system of election? What, in the affirmative sense, was this article 10 supposed to do?

PROF. BRADY: Open up the flood gates to Maritimes' complaint.' (Laughter)

PROF. McWHINNEY: Apart from that, what, as it now stands, does it do that is not now done? Presumably it speaks for universal mathematical representation, does it not, as it now stands?

MR. STEVENSON: Yes, I think there is a point in having the proposition to describe the system of representation.

PROF. McWHINNEY: Then you wanted to exclude Eugene's special position?

MR. STEVENSON: Yes, I think at this point we wanted to deliberately exclude the specific provisions for

representation.

PROF. McWHINNEY: That, and only that, is the purpose of this provision as it now stands, is that correct?

MR. STEVENSON: No, the first purpose is to put in proposition form the principle of representation in the House of Commons.

PROF. McWHINNEY: Representative government, in fact.

PROF. MEISEL: Are you suggesting here in the sense that you are now having the decennial census, or more frequently, and perhaps there should be an adjustment?

PROF. McWHINNEY: It surely follows.

MR. STEVENSON: Perhaps that could well come in.

MR. GATHERCOLE: I think it should.

DR. FORSEY: If you are going to go into that, it might be well to put in something to hurry it up, because after the last one there were extraordinary delays.

PROF. MEISEL: There is now new machinery for continuous review by representation officers.

MR. STEVENSON: And quinquennial census.

THE CHAIRMAN: As a matter of interest,

how many seats would Prince Edward Island have, one-half?

PROF. FOX: No, it would be approximately, under this system, probably one instead of four, and I think it is just inconceivable to imagine that the Atlantic Provinces are going to accept that on behalf of Prince Edward Island. I think this really goads them unnecessarily.

PROF. McWHINNEY: That is why I asked if you want to do that, really. Is there any point gained by exacerbating potential allies?

DR. FORSEY: New Brunswick is now down to its minimum, and in all probability Nova Scotia will be soon, and Newfoundland soon after; and the probability is that they are not going to get, no matter what the government does about the "just society", they are not going to get sufficient expansion of their population in the future to keep abreast of the growth in the rest of the country, and they may eventually be reduced to a very small representation in the Lower House, and I doubt very much whether this would go over at all well.

The Toronto Globe & Mail recently had a most abusive and high inaccurate editorial on which I commented, and I sent

copies of this down to the Halifax Chronicle-Herald and the St. John Telegraph Journal, who printed them. I have had some fan mail on the subject of a most ferocious kind, intimating that I did not see the half.

There is a lot of resentment in the Maritime Provinces of the domination of the central provinces, and I think it is asking for a good deal of unnecessary trouble to rub salt into the wounds.

MR. POSEN: Just two other things that came up at the C.C.O. meeting. We heard from some of the Western Provinces that they were unhappy about their representation in the Senate, and that it did not reflect their population.

This raised the question whether an Upper House is to have representation by population. So we are also thinking in terms of our proposal about the Senate: would you weight representation in the Senate differently? In other words, would you have provincial representation much closer or would you just ignore population in an Upper House -- in which case the floor that presently exists for P.E.I. might no longer exist.

PROF. McWHINNEY: It might be

better to state that. If, for example, one is edging into the American system where Nevada has one congressman but two senators because every state has two senators, whatever its size, but the complete population principles apply to the Lower House: if that is the purpose it might be best to state it and avoid this gratuitous offence to votes that Premier Robarts may need in the meeting; because this, as it stands, only means taking away the vested rights of Eugene's forebears.

PROF. BRADY: Of course, there is a difference between the American Senate and the Canadian.

PROF. McWHINNEY: I know, but it seems to me you can justify -- the mathematical representation takes on a different sense altogether if the Senate is juggled so that Prince Edward Island and Ontario have the same number or even some approximation of that.

DR. FORSEY: You are not going to get that.

PROF. McWHINNEY: Obviously not.

DR. FORSEY: Something more like equal representation of regions such as you have now.

PROF. McWHINNEY: For example, the American system is the Australian system, and it is followed in quite a number of other federal states, modern ones.

DR. FORSEY: But they are not in the same position as we are.

PROF. McWHINNEY: They have not got a going constitution to change from, I agree.

MR. GATHERCOLE: Looking at it a little realistically, except for history and sentimental reasons, it is really hard to justify the Province of Prince Edward Island, having 110,000 and Ontario with seven and a third million now and in another ten years maybe you can add another two million.

MR. STEVENSON: A million and a half.

MR. GATHERCOLE: Nine million in another ten years, so it is like Metropolitan Toronto. Proportions get out of balance and more distorted as time passes. It is only for that reason that I feel you could not put attractions to those provinces, and particularly P.E.I. to stand in the way of perhaps arriving at a consolidation or unification which has been adopted in pretty broad principle right here in

Ontario amongst the municipalities.

DR. FORSEY: Oh dear. If you are going to start comparing the historic communities of the four Atlantic provinces with Ontario municipalities, all I can say is you do not know the stomach of that people.

PROF. FOX: Can I suggest a compromise, that we turn the period after "population" into a colon and add:

"except for certain guarantees

"for some less populous

"provinces"

and then we can argue later and leave it to the C.C.O. to argue what that means. That would leave you room to reduce the minimum number for certain provinces but would not exclude them entirely.

DR. FORSEY: As a matter of fact, you can say "as a general principle", or something of that sort.

PROF. SYMONS: I think it would be better to say "as a general principle" because that allows for one or two other considerations -- rural, urban, and so on.

THE CHAIRMAN: Yes. Agreed?

PROF. BRADY: Agreed.

THE CHAIRMAN: Eleven.

PROF. FOX: On 11, though this is

the present system that the House makes its own standing orders, the question does arise in my mind that if you are revising the constitution should there not be a clause in the constitution that protects the interests of the minority, which would be the Opposition in Parliament, somewhat similar to the present clause limiting the length of Parliament unless there is a two-thirds majority vote in favour of altering the term?

In other words, I am not entirely sure the present system is an ideal system.

PROF. MEISEL: What about statutes? Are you suggesting removing anything from the House itself?

PROF. McWHINNEY: Yes, what about the important area, for example, of the House judicial powers, disciplinary powers over its own members, contempt against powers over non-members? Is that going to be in the statute?

DR. FORSEY: It says, "by statute or by standing orders".

PROF. McWHINNEY: They have inherent power now.

DR. FORSEY: I take it that we are going to take out of the British North America Act the section dealing with the

Speaker and the quorum and procedure and just say: "This can be regulated by statute".

You see, with some people, and I find among my students, for example, there is a good deal of nationalistic agitation on the subject of the present section that says:-

"The powers, privileges and
"immunities of the House of
"Commons shall not exceed those
"of the British House of Commons
"at the date in question."

I said: "Well, that is merely another way of saying, 'shall be infinite', for all practical purposes, because you cannot think of anything much wider than this 'powers, privileges and immunities of the British House of Commons;' but this violently offends certain of what I might call colonials' susceptibilities, because I think these people have not got past the stage of being touchy colonials."

Anyway, I take it this was an attempt to say, "Take it out of the constitution; make anything in there now, put it by ordinary statutes which can then be changed by the parliament of Canada without any special machinery so that you will not have

to get the consent of the Province of Prince Edward Island to some change in the powers, privileges and immunities of the House of Commons, but it would be regulated by statute. At present if you want to change the powers, privileges or immunities, I don't know -- I suppose it would come under 91(1) now.

PROF. FOX: Yes.

PROF. DEADY: It is not usual, actually, for the privileges of one of the legislative chambers to be protected in a constitution. That is an organic law.

PROF. McWHINNEY: Yes, it is not usual even to spell it out in the statute. It would give a lot of work to whoever had to draft the statute.

MR. POSEN: I don't think it was intended that they had to be in the statute as standing orders. The idea was to clear the constitution.

PROF. McWHINNEY: I think this is a good plan.

MR. POSEN: So it could read, by custom or by statute.

PROF. McWHINNEY: Yes, "by custom or statute" would be better.

THE CHAIRMAN: Would that fill it out, "by custom, by statute or by the

standing orders'?

PROF. McWHINNEY: Yes.

THE CHAIRMAN: Is that one all right? May we go on to dispose of the Senate here?

MR. STEVENSON: We didn't want to dispose of them.

THE CHAIRMAN: I mean, dispose of the proposition about the Senate.

"The Senate should be reformed

"to reflect more effectively

"regional interests".

PROF. FOX: What does "regional interests" mean? Is that a euphemism for provincial governments?

PROF. McWHINNEY: You don't want to escalate into what I think are very key principles -- provincial participation in the selection processes for the Senate, either complete provincial control or some joint provincial-Federal, or an allocation of percentages for representation?

DR. FORSEY: What did you say, you don't want to escalate?

PROF. McWHINNEY: I asked whether one did not want to take the next step of providing affirmatively that in the process of appointment to the Senate the provinces shall participate to degree X or

degree Y.

DR. FORSEY: Of course, the Americans have moved away from that, haven't they, because they originally had their state legislatures appointing the senators, and now it is a matter of election at large in the States, and the governments and legislatures have no more to do with the choice of senators in the United States than I do.

PROF. McWHINNLY: Except when a casual vacancy occurs.

DR. FORSEY: Yes.

MR. GATHERCOLE: Mr. Chairman, I think the words "regional interests" bother me a little bit, too, from the standpoint that the phrase "regional interests" may be attached to something which is less than a province, in other words, an area which is sort of lacking in economic development. You hear so much today about trying to redress regional economic disparities, and so on.

It seems to me that what you are suggesting here is that there should be provincial representation, and it would be better to say precisely what you mean, rather than saying "regional interests", and to say "to give representation to the

provinces".

THE CHAIRMAN: Or perhaps, to say it another way, in terms of reflecting the nature of a federal system of different governments whose interests might be represented in this forum. I think perhaps there is some virtue in sticking to the word "provincial" rather than "regional" here. "Regional" is a very highly generic term.

PROF. FRAPP: Very difficult to define what a region is.

THE CHAIRMAN: Sure.

MR. GREATHEAD: I suppose the only consideration here is if you were considering the major senate representation, whether you would want to do it along strictly provincial lines. Mr. Posen just reminded me that I think in one of the original drafts, "provincial" was there, and I raised this point and said: "I wonder if we want to lock it in in quite that way". This goes along with our later proposition on boundaries and so on.

I take notice of the comments that the Committee has made, and I just raise that additional point, Mr. Chairman.

DR. FORSEY: Yes, I thought that was the intention of having "regional" in there -- supra-provincial, as it were,

because of the very point that it was manifestly ridiculous to give equal representation in the Senate to the Province of Ontario and any one of the Maritime Provinces in 1867, and it would be even more ridiculous now, vastly more ridiculous.

On the other hand, you can make a much better case for saying: "Well, yes, all right. There is great disparity in population and wealth, but here, after all, you have got a group of provinces which have certain interests in common". To give them equal representation with a larger, wealthier province is another thing. Again, the rest of the Prairie Provinces may be quite different in population and wealth to Ontario and Quebec, but there may be an argument there.

Then there is the point you make about the possible breaking up of the provinces or unification of provinces, and this is causing a general, fresh confusion about fresh amendment of the constitution to allow for representation in the senate of these new units.

MR. STEVENSON: What about "to reflect more effectively the interests of provinces or groups of provinces"?

MR. GATHERCOLE: That is more explicit.

DR. FORSEY: I think that might be better.

MR. GATHERCOLE: There is the real danger of the other meaning being taken, whether sections of provinces should be represented. There may be some ethnic groups, or they may be economic groups or sub-standard economic groups, and that they should be represented; whereas I think it should be tied in to the province or it could be a consolidation of provinces.

THE CHAIRMAN: Would Mr. Stevenson's suggestion seem to meet with approval?

PROF. McWHINNEY: Is your complaint only really the present geographic system of allocation, or is the complaint more fundamental, that it is a Federal monopoly in the appointing process?

Mr. Trudeau seemed to say in the Press reports of a week ago that he was prepared to allow the provinces to participate in the appointing process.

On senates today, the comparative picture is very clear. It is one of two ways. Either the provincial legislatures elect, or the senators are elected by direct popular vote in provincial or

regional constituencies. This, of course, is not the Canadian system.

I would have thought that the actual geographic allocation though in the B.N.A. Act is not as objectionable as all that. It could be modified slightly to meet George's point, but surely are you not really in this article trying to hit the appointing process?

DR. FORSEY: I am very much afraid of this business of provincial appointees, because I think to a large extent it will mean that each provincial government will have its own chosen monkey-wrench figure right in the Parliament of Canada, and it seems to me that they have plenty of monkey-wrench figures outside the Parliament of Canada.

PROF. McWHINNEY: Paul could settle this other point. The B.N.A. Act has very precise provisions for this allocation of the 102 senators. It is not such a bad geographical distribution now.

PROF. FOX: No, I was going to raise the point that you were raising, and I wondered why we are being obtuse here. If the point you want to make is that the provinces should have a say in appointing some percentage of the total number of

senators from the regions, why can't we say it?

MR. GATHERCOLE: I agree.

THE CHAIRMAN: Is that the point?

PROF. FOX: Well, let me try it on you. You could simply say directly: "The provinces should be allowed to appoint a certain percentage of the members of the Senate from their region".

PROF. McWHINNEY: Or even if you say "all of them" and get it knocked down and compromise the point Paul is implying, the percentage.

DR. FORSEY: I remain firmly convinced that you are not likely to find agreement on any change, and if you found agreement it might produce something worse than you have got now.

PROF. McWHINNEY: It is hardly possible.

DR. FORSEY: It does a power of good now and very little harm. Nearly everything else would be more powerful and would do more harm.

PROF. BRADY: What are we discussing anyway, 1 on page 12?

PROF. McWHINNEY: We are discussing the failure to have point number 6 in.

The inarticulate major premise

surely is point 1(a) which Paul has just spelled out for us which is not there.

MR. GREATHED: Just in answer to this point, I don't think this other point that you raised, I think it could be a separate proposition. I think we were here thinking of the present representation.

PROF. McWHINNEY: I challenge your assumption in the present point 1, that it is surprisingly unsatisfactory as to geographical representation of provincial and regional interests. I do not think this is true, particularly in terms of the B.N.A. Act as it now stands. You are referring to a certain quality of senators, and the overwhelming monolithic character of the political credentials.

DR. FORSEY: It overweights decidedly the Atlantic Provinces, because you have got thirty senators from the Atlantic Provinces, and with all my divided loyalties to Nova Scotia and Newfoundland, I think this is overdoing it.

PROF. McWHINNEY: You have got 72, then, for the rest, have you? In comparative constitutional terms, this is not overweight if you look around the world.

DR. FORSEY: It might be a little overdone.

PROF. McWHINNEY: All the federal countries, taken one by one.

PROF. BRADY: Thirty senators for the Maritime Provinces; twenty-four from Ontario. Compare the populations and there is a very considerable disparity, is there not?

Then the complaint which was referred to earlier by the West -- and incidentally that complaint was raised quite vociferously by British Columbia in one of the conferences, the last conference in 1964, I think, in the amendment procedure, that it felt that it, as an area, is very much under-represented in the Senate, and it is.

DR. FORSEY: I do not think we should entirely rule out the possibility of some shift there. I think it is going to be very difficult to arrive at any shift that will have any chance of being accepted: but I am entirely sceptical about the whole business of Senate reform. Every time I hear it I am reminded of what Meighen said in the 1925 election when King announced he was going to come out for senate reform: "So that old bird is to be provided with wooden wings and told to fly again". I shall believe it when I see it. If I live

to be as old as one of my Newfoundland ancestors, 100 years and 5 months, I do not expect to see it.

PROF. McWHINNEY: It is one of the few concrete things Mr. Trudeau seems to have said on his constitutional plans, apart from the entrenchment of the Bill of Rights. He is reported in the Montreal papers as saying that the provinces should participate in the selection of senators. Why not hold him to it?

THE CHAIRMAN: As a matter of fact, though, one of the things that interested me a little bit in another context, the context being that the Federal officials had not really discussed this at all with us in the C.C.C., is a statement which Mr. Trudeau made in answer to a question in the House of Commons the other day, that he would be placing before the provinces at the Constitutional Conference in December certain proposals for the reform of the Senate. I am very curious to know what these are, since they have never been discussed in the Committee.

DR. FORSEY: And he also said in another speech that he wanted to get the provinces to agree to a proposal for the

reform of the Senate, but if they would not agree he was going to go ahead anyway: and, of course, according to 91(1) he can do it, provided he can get Their Honours, themselves, to consent.

PROF. McWHINNEY: Well, you can see in the Quebec case this is not impossible.

MR. GATHERCOLE: Mr. Chairman, in view of the other proposals that are made for revision of overhauling of the constitution, it seems to me that to leave the Senate intact would be perhaps the first measure that should be undertaken to bring about some amendment, judging by the broad public opinion which is held about the value of the Senate, which may not be well warranted or justified, and that has a number of defenders around here; but I still think myself the way this should be done would be to have the provinces in a position where they could make some appointments to the Senate, and I think that is the way it should be phrased here.

(Page 182 follows)

THE CHAIRMAN: Have we enough diversity in this one that we can phrase some conclusion?

MR. GREATHED: I wonder, Mr. Chairman, if we do not have to talk about three separate matters: the matter of provincial participation, the matter of the Senate function (the point in point 4 of this proposition) and the matter of representation pattern. I wonder if this really cannot be developed perhaps into -----

PROF. McWHINNEY: Except the feeling here was that one of these issues was much more important than the other two, and that this should be the thrust of the recommendation.

To be frank, since the Prime Minister, Mr. Trudeau, seems to be giving away something that he has got (it is in his interest to keep what he has got) I would have thought any provincial Premier who wants a better tax revenue, a better voice in all these things, would want to strengthen his hand in the Senate. This is an obvious area for expansion.

PROF. BRADY: Not in place of increased tax revenue.

PROF. FORSEY: As a tool for helping to get it.

PROF. McWHINNEY: As a tool for helping to get it, but it seems to me one of the points that one should push, but it is for the political judgment, obviously, of the Premier.

DR. FORSEY: Four seems to be very vague. This whole page has an air of jumping on eggs. I do not know what it is you are trying to say, but you are being most extraordinarily coy and cautious about saying it. There are all sorts of hints, winks and raises of the eyebrow, but practically no statement of anything. "The corner of Jeeves' mouth twitched, but that is as near as he ever got to smiling".

(Laughter)

PROF. McWHINNEY: Who is "Jeeves"?

DR. FORSEY: ".... should be discussed publicly, most suitably in some institution of the central government." What are you going to do, just be allowed to talk there, be a debating society? Are you going to give them some new powers or what?

PROF. FOX: This point is raised in the next recommendation or proposition, but there is one point left out of this and that is any discussion of reforming the powers of the Senate.

DR. FORSEY: That comes in, presumably, on 13 and in 2 thereof, on which I have put five question marks.

THE CHAIRMAN: The only way to salvage this proposition is to cut it off at the end of the first four words.

PROF. FOX: Well, the problem in regard to powers is greater than the problem of inter-governmental relations. You have a

curious situation in which the House which is so reviled still has far more powers than the British House of Lords has; yet we have not mentioned that, and it would strike me that that might be an area you might want to consider.

The other omission is the fact that as to explanation item 1, I think one of the original purposes, certainly in the minds of some of the Fathers of Confederation, was to protect property and conservatism (to use MacDonald's phrase); and this raises the question of the qualifications of the individual senators. So that probably some attention should be given to that: what are the property qualifications for the senators, which at the moment are greater for an ordinary M.P., to continue at that level?

PROF. McWHINNEY: It is an iniquitous provision, even if the base of four thousand dollars is not what it was. This perhaps is one of those minor details that probably ought to be struck to-day.

THE CHAIRMAN: Just in view of the time, I do not want to foreclose discussion, but I would like to get through the propositions; it would be helpful to us.

MR. GATHERCOLE: I wonder, Mr. Chairman, before leaving this, would it not be

desirable to group these propositions together in one, instead of having three or four of them dealing with the Senate - rather wrap them up?

MR. STEVENSON: One of the things we have found though, Mr. Chairman, about this: we started off with some omnibus propositions where a lot of the meat was contained in the explanation; but we found increasingly that the other governments, and the federal government particularly, have been providing almost no explanation but have been having each little bit of its proposal contained in a separate proposition.

The problem has been then that when the Secretariat has put things together, it has left out the explanations and it has classified only the propositions themselves at the top; and by their preparing omnibus propositions we lose a great deal in the later discussion in the Committee, although we think it is preferable.

MR. GATHERCOLE: What I meant was to deal with the Senate and have 1, 2, 3, 4, whatever you want, but not scattered around.

MR. STEVENSON: Right. I know.

THE CHAIRMAN: Your suggestion, George, is that this might be broken down into a set of propositions one after the other, each of which reflects the objective which is

being sought.

MR. GATHERCOLE: Yes, and it would be then a coherent whole.

For example, your next one deals with federal-provincial relations. I think if you are going to have the Senate and it is going to be consistent with what you are proposing in the early propositions, then it has got to have the opportunity to deal with and discuss, debate and study any number of things.

PROF. BRADY: Mr. Chairman, before we move on from 13, which I assume we are doing, I hope Paul's remark is not overlooked. In other words, did you need to define a little better what the functions of the Senate are?

THE CHAIRMAN: Yes.

DR. FORSEY: Yes, and in particular, Mr. Chairman, really No. 2 on page 13 is garbage:-

".... could have as its major role
"the resolution of intergovernmental
"questions."

Now, really, how can anybody, with all due respect to the learned people who wrote this up, how can anybody tell us that the Senate, no matter how it is reconstituted, is going to resolve intergovernmental questions? Is it going to put the Government of Canada and the provincial governments and legislatures

on the side lines? Is it going to supplant the Supreme Court?

The resolution of intergovernmental questions simply cannot be entrusted to any conceivable variety of Upper House. The Court will come into it; the governments of the provinces will come into it; the Government of Canada will come into it; the House of Commons will come into it. This thing as it stands is most staggering.

MR. GREATHED: I have that scored for another look, Dr. Forsey.

PROF. BRADY: Mr. Chairman, I think all the points have been made eloquently, and we can go on.

THE CHAIRMAN: We will just change that resolution to "contemplation" I think.

Now 14. We will let Dr. Forsey speak to this.

DR. FORSEY: I see nothing the matter with this.

PROF. FOX: Raises the question of what Ontario's response should be to Premier Bennett's suggestion to incorporate the Yukon and the Mackenzie Basin.

PROF. SYMONS: It probably is not necessary, because he draws on the historical analogy (which is perhaps an analogy) of the

expansion of Ontario and Quebec.

THE CHAIRMAN: Yes. Indeed, I think I mentioned before I saw in someone's office in Ottawa a very interesting time series of maps showing the **change and** expansion of the boundaries - very, very interesting.

DR. FORSEY: It is in the atlas in the Parliamentary Library, for one place.

MR. STEVENSON: We have it right here. This is an historical map.

DR. FORSEY: All you say here is "consider".

PROF. MEISEL: I think this is excellent.

THE CHAIRMAN: The next one is not the one in your package but an insert, is that right?

MR. GREATHED: That is right.

MR. POSEN: That would be 14A. One has a little "15" up in the right corner, reading:-

"Any changes in provincial boundaries
"should be subject to negotiations
"and agreement among the provinces
"concerned and the Federal Government."

DR. FORSEY: That is pretty much the present situation.

THE CHAIRMAN: Is that agreed?

Then 15:-

"The titular head of the executive
 "branch of the provincial government
 "should be appointed by the Prime
 "Minister of the Province and the name
 "of the office changed to something to
 "conform with this new situation."

PROF. FOX: In the second line, do you
 not mean:-

"... should be appointed by the Governor-
 "General on the recommendation of the
 "Prime Minister of the province"?

THE CHAIRMAN: I guess you have to.

PROF. FOX: I would think so, yes.

MR. GATHERCOLE: I wonder whether it
 would be otherwise consistent with the type of
 monarchical form of government which is prescribed
 in the early part.

DR. FORSEY: My comments on this
 will be surmised.

THE CHAIRMAN: I am very interested
 in this proposition as an academic question
 in political science.

Once again, I can see a conflict
 between whether this person is, what shall we
 say, a linear representative of the Crown in
 the sense that you have the Crown and your
 Governor-General representative, and this is
 the provincial equivalent; or whether he is

to the province in terms of its sovereign spheres of jurisdiction and legislation as a Governor-General is to the Federal Government in its sovereign spheres of legislation; and in this sense there would be a logic to having the same practice in the province as you would have in the federal.

PROF. McWHINNEY: The latter is the standard common law position, and as long as this monarchical link is retained it works without any problems at all; because then the Prime Minister of the province makes the recommendation to the Queen as head of the Commonwealth and she makes the appointment.

I suppose it is a little embarrassing here if you have the recommendation going to the Governor-General of Canada, who is, I suppose, more a federal officer than anything else; but the theory still is that the Lieutenant-Governor or the successor office to this, is the head-of-State role within the province, and it is a separate sphere of operation to that extent from the federal powers.

As I say, it works quite well in general Commonwealth constitutional law. There are no special constitutional problems.

THE CHAIRMAN: What bothers you about this, Eugene?

DR. FORSEY: It is again this qualification of the provinces. Again, I am a John A. MacDonald Conservative. We are nearly extinct now, unhappily, but there are a few of us around.

MR. GATHERCOLE: The dinosaurs!
(Laughter)

PROF. McWHINNEY: The business of nomenclature is presumably to accommodate Quebec if it changes its titular head of State to President and Lieutenant-Governor as now suggested.

PROF. CONWAY: What are they going to call it?

PROF. McWHINNEY: Well, because of the requirement as to Lieutenant-Governor, "President and Lieutenant-Governor".

MR. STEVENSON: Mr. Perry suggests "branch manager". (Laughter)

PROF. MEISEL: The President is the Speaker in the National Assembly.

PROF. McWHINNEY: Well, in France we have, what, five Presidents: President of the Republic, President of the Senate, President of the National Assembly, President of the Council of Ministers. I have forgotten one - President of the Conseil d'Etats.

PROF. CONWAY: This proposition here

has within it two conflicting spheres of sovereignty. This does not matter except to the people who are interested in political theory. It is a monarchical one on the federal level, and it is purely popular, democratic one on the provincial level. I suppose it can work, but they are inconsistent.

THE CHAIRMAN: I don't quite follow that.

PROF. CONWAY: You say:-

"The titular head of the executive
"branch of the provincial government
"should be appointed by the Prime
"Minister of the Province"

The Prime Minister of the province is indirectly elected by the people of the province; the Governor-General is appointed by the monarch, head of State. So in the province it goes up from here, and in the federal it comes down from here. So in the province you have got the sovereignty vested in the people, and on the federal level you have sovereignty vested in the Crown.

MR. STEVENSON: Well, Professor Fox's recommendation, if you took that:-

"...appointed by the Governor-General
"on the recommendation of the Prime
"Minister of the province."

presumably gives you the consistency.

PROF. McWHINNEY: To the extent that you still retain the monarchical principle (I don't know if you wish to) you could follow the Australian practice where it is:-

"... appointed by the Queen-in-Council

"on the recommendation of the Prime

"Minister of the province."

If you are going to have "the Queen-in-Council" to the Governor-General, I don't see what is to stop her Secretaries doing the same function for the head of State of the provinces.

DR. FORSEY: I doubt if people here would separate -----

PROF. McWHINNEY: Quebec might not, of course.

DR. FORSEY: Australia has always been that way. It hasn't been that way here.

PROF. McWHINNEY: But it would apply to the Governor-General.

DR. FORSEY: Oh, yes, but I think it may be too clever by half for popular consumption.

MR. GATHERCOLE: Is not the importance to the province that the appointment would be made on the recommendation of the Prime Minister?

PROF. McWHINNEY: By the province.

MR. GATHERCOLE: Yes. It doesn't matter who makes the appointment.

THE CHAIRMAN: No.

MR. GATHERCOLE: If the appointment is made on the recommendation of the Prime Minister, you achieve everything you want. So it is a question of whether it is the Governor-General in what seems to me to be the way which is easier to sell, having the appointment made by the Governor-General, than it would be to have the Queen do it.

THE CHAIRMAN: I would think so.

DR. FORSEY: Something depends on what you think the functions are going to be. If you do not get the abolition of the power of reservation, it seems to me there might be some argument for having him appointed by the central government, as he is now.

I am inclined to think, though, that this is probably a dead duck, just as I think Senate reform is a "bird with wooden wings".

PROF. McWHINNEY: Except there is an area, on the basis of comparative federal practice, where in the appointment of senators, appointment of Lieutenant-Governor, appointment of provincial Supreme Court Judges, I could see, following the Australian practice and most of the Commonwealth constitutions that have been drafted since the War, you would set up a new area of provincial power and responsibility for the Senate-appointing process,

the total appointment perhaps of provincial Supreme Court Judges, Lieutenant-Governor. There is nothing revolutionary in that concept, and it would certainly reflect a more pluralistic federal system.

PROF. FOX: May I just point out, Mr. Chairman, I think there is an error in explanation 1: "... holds office during the pleasure of the Governor General". The term is actually for five years - Section 59 of the Act.

PROF. SYMONS: Mr. Chairman, aren't we pretty close to a consensus on this?

THE CHAIRMAN: I think we can move on.

PROF. SYMONS: And it should be the recommendation of the Prime Minister.

DR. FORSEY: "A Lieutenant-Governor
"shall hold office during the pleasure
"of the Governor-General."

PROF. FOX: Right. Read on.

DR. FORSEY: "... but any Lieutenant
"Governor appointed after the commence-
"ment of the first Session of the Parlia-
"ment of Canada shall not be removable
"within five years from his appointment,
"except for cause"

He can be removed; they have been.

PROF. FOX: But he is not removable for five years.

DR. FORSEY: Oh, yes.

MR. GATHERCOLE: In any event, Mr. Chairman, I think the present situation is rather anomalous, and it would be better for the Prime Minister of the province to have it.

THE CHAIRMAN: I think that is the consensus.

DR. FORSEY: The only cause assigned in the two clauses is that his usefulness is at an end.

THE CHAIRMAN: 15A is an insert, the other insert we distributed:-

"Provinces should be free to adopt any
"truly democratic form of government."

PROF. McWHINNEY: I think this is both a statement of the present law, subject only to the limitation of Section 92(1), and I think it is sound; it also, by the way, accords with Commonwealth constitutional practice in other federal states, whereby the power to amend and so on is within the provincial control.

DR. FORSEY: In "1" there it is not strictly true, surely, to say:-

"This requirement may prevent the
"adoption of any form of government
"except a parliamentary one."

Is there anything, for example, to prevent the legislature of any province from enacting

that no member of the provincial Cabinet shall be a member of the Legislature?

PROF. McWHINNEY: Nothing at all. You are quite right, Eugene. This is an inaccurate statement. The only thing that, for example, Quebec could not do, as things now stand, would be to abolish the office of Lieutenant-Governor.

It could certainly introduce an American system of government, in my view.

DR. FORSEY: It may go a little beyond that because of the Judgment in the "Initiative and Referendum" case; it might mean that they could not take away the power of the - whoever he is, Lieutenant-Governor or whatnot, to dissolve the legislature.

It could not, for example, adopt the American system of a fixed date for elections, come hell or high water.

PROF. McWHINNEY: That would be the more arguable point, I agree.

DR. FORSEY: If you followed the "Initiative and Referendum" Judgment.

PROF. McWHINNEY: I certainly agree with your basic point though.

MR. STEVENSON: Should we just strike that second -----

MR. GREATHED: Well, the operative word

is "may". I am not sure what the implications are of the office of Lieutenant-Governor.

PROF. McWHINNEY: No, the point of restriction to parliamentary form would not come from the office of Lieutenant-Governor, but the Supreme Court decision. There is some very powerful Rand dicta on the writing of the B.N.A. Act and others as establishing a parliamentary as distinct from the separation ---

DR. FORSEY: Better look at the Judgment of Lord Haldane in the Initiative and Referendum case, Manitoba, in 1919 I think; because he said flatly that you would not have the initiative in referendum. This particular legislation as regards the office of Lieutenant-Governor ----

THE CHAIRMAN: We will note that point and, I think, strike that sentence.

MR. GATHERCOLE: Do you not open the door too widely here, so that in the end you have got provincial constitutions being created - it is nice to see them but you have got provincial constitutions which, no matter how you protect it, are still going to be in many areas in direct conflict with the overall constitution which seeks to achieve unity.

Now, I know you have some other ----

MR. STEVENSON: Do you see the next proposition?

MR. GATHERCOLE: Yes, I see, but I am wondering who is going to determine it. If you haven't got some pattern that is common to all the provinces, and if every province is entitled to launch out into any field it wants whatsoever, then it seems to me that you may become so discor-ordinated that you will never be able to reconcile the powers of each province within the whole.

DR. FORSEY: I think there is a real danger, especially taken in conjunction with the document we were looking at this morning.

If you have the thing wide open and Quebec elects a president - a president of Quebec, National Assembly of Quebec, and a completely American system of government (fixed dates for elections, no matter what); or, for example, a Gaulist system of government were to be adopted in these circumstances, then it becomes an imperial v. imperial and, I am sure, taken along with the claims for provincial participation in international affairs (and I notice there is some kind of jiggery-pokery about that in the Ontario proposition, you get to the place where you are going to re-enact just as sure as fate the evolution of dominion status in international affairs - and goodbye!

PROF. MEISEL: Mr. Chairman, I have been thinking along some of these lines but

with some different perspective, and I hesitate to get into this because I think one of the virtues of our discussion so far has been that we have been very precise and we have been talking more or less of basic, specific changes in the constitution; but underlying a lot of the things, it seems to me, there is a very serious philosophical problem which maybe we ought to discuss.

It seems to me, very briefly, it is this: that there is one province, or one group of Canadians, it seems to me, who do not feel as Eugene does as a sort of MacDonald Conservative, and their view of Canada is quite different. They are much more concerned with provincial rights, and they think of the country more as a pluralistic partnership of provinces.

It seems to me that the question that one faces in terms of strategy is whether, from the point of view of Canada as a whole, is it wise to give in to this and weaken some of the clearly nationalising ties that reside in Canadian national institutions so as to permit this provincial rights sentiment to express itself and possibly to dissipate itself over the next fifty or a hundred years, so that when economic equality is perhaps achieved in Quebec this sort of provincial rights

sentiment will disappear; or whether by giving in to these provincial rights claims you so weaken the country as a whole that it will fall apart.

It seems to me that the two sort of extreme options are: resist so strongly to these demands that Quebec will say: "Well, we don't want to be part of this country; it is too restrictive"; or, give in so much that you loosen the ties to the point where the thing will fall apart.

Now, I think there are some sort of polar differences. I think Eugene is very afraid that if you make too many concessions the system may disintegrate, and that we shall start in a dominion-status sort of process.

I am not quite as optimistic perhaps that you can hold the country together if you do not make some of these concessions. I do not know whether there is any objective way in which one can say which of our fears and advice is more correct (I suppose only history will tell); but I think this is really the option that we face here and we should perhaps approach some of these questions from that point of view.

DR. FORSEY: I would not necessarily stand by this acceptance as regards the office

of Lieutenant-Governor. If they wanted to provide that there should be fixed elections; there should be no possibility of whoever this Johnnie is (Lord High and Mightiness or whatnot) dissolving the legislature, but that it should be elected for a fixed period (as in the United States); that no member of the legislature should be a member of the Cabinet (as in the United States): they can have the whole American system, if that is what they want. However, I would jib at this business of "Republic of Quebec". I do not think you can have a "Republic of Quebec" inside the monarchy of Canada; and even if you had a Republic of Canada, I do not think you could have a Republic of Quebec.

You could have a State of Quebec with a republican form of government, like the states in the United states which are guaranteed a republican form of government under the constitution; but the minute you have something separate called "Republic of Quebec", with the President of Quebec sending people to take part in international conferences, signing international agreements, then the jig is up in my judgment.

PROF. CONWAY: There are two qualifications about that, I should have thought. Is

it decided it is going to be called "Republic of Quebec"?

DR. FORSEY: That is what they are asking for in this document. I mean, you have to be on the watch for what you are conceding. There are some things I would say "yes" and certain other things I would say "no".

PROF. CONWAY: There are two parties to diplomatic recognition, that is, the "Republic of Quebec" and the other power. If Paris would, Washington certainly would not; neither would Germany.

Although I share many of your fears, I do not think it is quite a comparison to the development of dominion status.

MR. GATHERCOLE: Mr. Chairman, is there not some middle position here? I recognize you have to have a certain element of diversity and what will fit Ontario and many other provinces is not going to fit the Province of Quebec, but I do think the differences should be spelled out; it should not be just an open chapter but it should be set out and the other provinces should have some right to agree, in the same way Quebec would have the right to the setting out the prescription of the spheres of activity for the other provinces.

Where there are differences they should be reached in consultation together, rather than

leaving the field wide open to adopt whatever you like so long as it conforms to this broad, general principle which would be very difficult to spell out in detail.

DR. FORSEY: Which is set out in effect in the proposition on page 16:-

"If any province chooses to have its
"own written constitution, provisions
"in such a constitution must not conflict
"with any provision of the constitution
"of Canada."

PROF. SYMONS: Mr. Chairman, just on one point, I think the analogy may not be exact as a sort of creeping dominion status, but I think it is a very shrewd one. I think, as Professor Meisel says, though, it is a calculated risk, and it is the best way to try and contain this.

The interesting thing, listening to Dr. Forsey, is it does not matter whether it is "Republic of Quebec" or "kingdom of Quebec": anything that can help an international misconception about Quebec as a sovereign nation is very dangerous.

I think his reference to the way in which this crept forward in terms of dominion status for Canada as a whole might just have something in it. I would not press it too far,

but it seems to me a very perspicacious thing about the historical process.

DR. FORSEY: As for the other party's recognition, do not forget that the Americans were among the very last people really to admit the independent state of Canada. Other people were ready to admit before they were.

PROF. CONWAY: Presumably the same thing would apply to their recognition of the state of Quebec.

DR. FORSEY: We had become pretty well independent while the Americans were still fussing about whether we should be at the Washington disarmament conference on our own or not. We were in the League of Nations, in the I.L.O.;
recognized
we had the/right to be on the Council of the League of Nations; but the Americans were still being stuffy about it.

Admiral Leahy during the last war made some remarks (and he had a pretty responsible position) that appeared in the Saturday Evening Post about Canada being simply instructed by the British Government or something like that.

THE CHAIRMAN: Can I call a few minutes recess?

-----Short recess.

THE CHAIRMAN: Can we resume? Our ranks are getting thin, and I don't know how long you want to carry on. We have about six

or seven more propositions. No. 16 - any comments on 16? Can we go on to 17?

DR. FORSEY: I don't like it. We have hashed over this thing about the Supreme Court times without number, and all I can say is that I stand by the original and, I think, several times reaffirmed position.

I must say again, here is a phrase that is sort of egg-like treading about "some provision should be made", some role for the appointment of judges.

THE CHAIRMAN: As you say, we have been over this a great deal, and I think we have the -----

PROF. SYMONS: May I just ask a question, Mr. Chairman? I agree and I don't want to prolong it. Has Professor Lederman expressed any recent thinking on this issue; does this support his present view?

MR. POSEN: I think we just tried to take into account some of his previous comments and the idea in this was to see if we had succeeded. It is unfortunate that he is not here to-day.

THE CHAIRMAN: Well, 18?

PROF. BRADY: The problem, I suspect, is how to get provincial participation.

MR. POSEN: Well, it is fuzzy, but it would have raised it for discussion in the

C.C.O., and it would be interesting to guage responses, whatever ideas there were, to fill out the two words "some provision".

THE CHAIRMAN: This is more, again, a statement of objectives, which is a hard one to realize in function

PROF. BRADY: "A permanent intergovern-mental relations board"?

THE CHAIRMAN: I think we are on 18.

PROF. BRADY: I beg your pardon. I am on 19.

THE CHAIRMAN: 18 and 19 are a pair.

PROF. MEISEL: Mr. Chairman, I don't know whether this is the appropriate place. I think something of this sort should certainly go in.

I also wondered whether in the preamble there might not be some attempt made to state some of the things which Mr. Robarts has been reported as saying in to-day's Globe & Mail where there is a view of the nature of Canada, as apart from the provinces, which I think is the underpinning for this kind of plank; and I think probably it ought to be put very clearly in the preamble with some such phrase as that the provinces are dedicated to certain kinds of joint enterprise or joint life, and that they fashion institutions which are designed

to achieve these ends, something of this kind.
I am not putting it very well.

DR. FORSEY: I think the less you put
in the way of statement of general principle,
the less trouble you will have and the fewer
traps you will lay for yourselves and your
posterity. As Sir Arthur Boyle always said:
"What has posterity ever done for us?" We
should give some consideration to it nonetheless.

PROF. SYMONS: It would be nice to
have some. (Laughter)

THE CHAIRMAN: These kinds of proposi-
tions on intergovernmental relations I see as
propositions designed to open up a basis of dis-
cussion of issues which these reflect; and
whether it comes out to be a constitutional
provision or some kind of development of machinery
to handle the problem is yet to be resolved;
but I think it is an attempt to express what are
certainly often-stated preoccupations of the
Government of Ontario.

DR. FORSEY: I think these three
pages are fine as they are.

THE CHAIRMAN: 18, 19 and 20.

PROF. BRADY: On 19, I did not have
the chance to read these documents before the
meeting, so I am reading rather quickly.

This "intergovernmental relations board",

is it to consist of individuals who would be sitting in some place in Ottawa, the permanent representatives?

THE CHAIRMAN: Well, presumably, although I don't know that it went that far.

MR. GREATHED: No. 3 suggests this. This is an idea (I suppose one of the ideas that was original to us); that we were thinking of the possible kind of machinery you might have and something a little more specific than just simply a general principle. Therefore, we have worked it out on a very tentative basis, and I do not think we have thought the whole thing out, but item 3 began to suggest the composition of this board.

PROF. BRADY: Where is the board to be?

MR. GREATHED: Well, it might be located in Ottawa; probably would be logically.

PROF. BRADY: I have doubts about an intergovernmental board. It means you are creating another level of government, aren't you? My point, to put it very briefly and bluntly, is that it is desirable, surely, to have the governments confront one another, that is, people in governments who have a sense of responsibility and who can speak for their governments as ministers in a conference - or as officials in an officials' conference: they have defined

functions or a defined role in a given case. But a body that is permanent, say, in Ottawa representing the provinces, to speak for them, becomes a kind of fifth wheel.

MR. POSEN: I do not think that is what we had in mind. You could have a board made up of ministers of intergovernmental affairs --

PROF. BRADY: Yes.

MR. POSEN: --- if you wanted, or their deputy ministers. They would not be representatives; they would be delegates.

PROF. BRADY: They would not necessarily be resident in Ottawa?

MR. POSEN: I don't think so. Maybe their staff, their secretariat would be.

THE CHAIRMAN: I think this is more a specification problem. I think there is a big difference between provision for a permanent board sitting there, and the secretariat which is merely handling paper work, preparing for federal-provincial conferences and so on, much as the secretariat is doing now for the Continuing Committee of Officials - and provision for a third type of interchange which is a provision for regular meetings of ministers on intergovernmental affairs. I think that this perhaps does not specify clearly enough what is exactly contemplated.

DR. FORSEY: I thought it was intended to be a secretariat, and that the other thing was a more high-falluting name for it.

I rather share Alec's doubt about the permanent board. A secretariat, however, doing a lot of this paper work, it seems to me, might be quite useful.

PROF. BRADY: Better substitute.

THE CHAIRMAN: Better clarify that one.

MR. PERRY: Just as an aside, Ian, has anyone seen Ron Burns' study yet?

THE CHAIRMAN: No. We have not seen that.

MR. PERRY: It has been turned in.

MR. STEVENSON: To the federal government. There might be a point in taking out the word "board" and using the word "secretariat".

THE CHAIRMAN: I think that is clearer. Can we go on to 21 then - External Affairs?

DR. FORSEY: I am firmly and irrevocably opposed to this:-

"..... provincial governments should
"have the right to treat with foreign
"governments in matters of provincial
"constitutional jurisdiction."

I think the thing has been adequately and admirably covered by the White Paper, and I would not touch this part of this thing in paragraph 3

with a barge pole. I think it is one of the most dangerous things you can possibly put in, unless you are just prepared to set up a staging post on the road to separatism. I would not touch it at all.

This is nothing to do with the network of trans-national agreements kind of thing that you have got with the Department of Highways of Ontario and the Department of Highways in Michigan or wherever it may be (all that is well enough and there is no difficulty about that at all); but when you talk about treating internationally with regard to matters under their constitutional jurisdiction, then you are getting to a much wider field, unless you are going to define it very, very carefully indeed.

To put in: "... as long as such dealings are compatible with Canadian foreign policy" does not, in my judgment, much improve matters; because the term "foreign policy" can be so extraordinarily vague. The Government of Canada will interpret it one way, and the Government of Quebec will interpret it another way; and you will open the way as wide as the sky to all kinds of rangling and grumbling and rowing. Better get the thing settled once and for all.

PROF. CONWAY: However, it seems to me,

Mr. Chairman, that the position of Canada internationally should be taken into consideration, because it seems to me it is going to be harmed by this. It is not only the Province of Quebec. It is highly likely that the Province of British Columbia would assume these privileges, and then what does Canada mean internationally to other powers?

Unless we can include this within a whole new conceptual framework of what a country is and have that recognized, we are going to seem, I think, rather like the Holy Roman Empire in the last stages of its disintegration.

I have sympathies for strong local feeling and historic grievances and that sort of thing, but I cannot see this as being consistent with a respected place for Canada in the world.

DR.FORSEY: The White Paper makes, it seems to me, ample provision for all kinds of representation of provincial interests.

One address - the address is "Ottawa". You don't even need to put on a postage stamp.

THE CHAIRMAN: We have talked often about the dilemma here as to external relations within provincial jurisdiction. I think the burden of ingenuity here has to lie with the federal people to make the kind of facility

available and to make things work.

I think there are two levels of grievance in the provinces as to what has been in the past. I think it is quite true that Quebec have a very different objective in mind, and that is perhaps a constitutional objective quite apart from the practical matters involved.

I think many of the other provinces, including our own, would like simply to get beyond this problem where the Federal Government would be appointing delegates to an educational conference in an area in which they have no officials on their staff, so who are they going to send? - this sort of thing. If a means can be found to accommodate that kind of problem, and perhaps in the directions that have been apparent in the last few days about the Federal Government making more latitude in this area, this problem may solve itself without there being ---

DR. FORSEY: It is all there in the White Paper spelled out in great detail.

MR. GREATHED: Yes, unfortunately the practice is not always -----

THE CHAIRMAN: Everything is the practice, Ed. I think I tried to make this point at the last meeting of officials, at which there was a pretty hot discussion about this, and I tried to plead with the Federal

officials that 90 per cent of what was wrong was the working of federalism, not with the arrangements that were there. It is the attitude of mind, the style of approach and so on, which, whether you agree with it or not, psychologically so often puts the provinces in the position of feeling that in the areas which were sovereign to them they were not being given adequate treatment or reception or provision. It is very much an attitude of mind.

DR. FORSEY: All you have to do is keep rubbing their noses in their own policy statement, which is extremely explicit. After all, this is a fairly recent policy statement. You cannot have very much of a corpus of practice under it yet. You mentioned this Niger thing yourself. They are apparently now proceeding on exactly this basis.

THE CHAIRMAN: Personally, I think in all of these things (and I think this has been brought out by John Meisel before) there are two things you are dealing with. One, like designing an automobile, I suppose, there is the most efficient functioning of the thing you are trying to work at; but beyond that you are trying to think of the whole style and purpose of the machine taken as a whole. We do not want to lose sight of either of those

and become so mechanical that we create some kind of machine that we did not set out to do. I think that is always before us.

I think this is one, in any event, that the Government will look on here with very great concern before anything would be transmitted.

There are just two others then. 22:-

"Any matter capable of unilateral
"amendment by any jurisdiction should
"not be included in the constitution."

MR. STEVENSON: Are not some of the earlier things in the internal statement of the Federal Government in that category?

MR. GREATHED: That is true.

THE CHAIRMAN: I was just wondering if there is anything contradictory in this to some of the things that have gone before.

MR. POSEN: I think what we were saying is that if it is important enough to be put in the constitution, then it should not be capable of being unilaterally amended, and it may mean a reduction in 91(1).

THE CHAIRMAN: Do you not mean it the other way around, that any matter that is included in the constitution should not be capable of unilateral amendment?

MR. POSEN: All right.

DR. FORSEY: I thought it meant that,

certainly, that the constitution includes things that cannot be changed unilaterally, and that if it is something that can be changed unilaterally it ought not to be in the constitution.

My difficulty with this one is the statement that the written constitution should set out the rules of the political system, which takes in a terrible lot of territory. There are an awful lot of rules in our political system that you would have your work cut out to put into a written document.

THE CHAIRMAN: I have underlined that.

DR. FORSEY: As I said at the last meeting of the task force, perhaps at the last meeting of this Committee: all the books in the world would not contain it. It would take anybody thoroughly acquainted with the system weeks and weeks just to write down the things that captivate his mind in that period. You would not have it complete then. You have to limit it a little bit. I don't know quite how you would do that.

THE CHAIRMAN: Better give some detailed consideration on that.

DR. FORSEY: The whole system of responsible government, standard of government is defeated by a snap vote on a tax measure and

have to resign office and ask for dissolution of Parliament - my gosh, you are not going to put that kind of thing in the constitution, capable of amendment only with the consent of Prince Edward Island. It seems an unfortunate jurisdiction to be allowed to survive.

DR.FORSEY: Modified set of rules in some way; just the basic principles, as it were.

DR. FORSEY: Yes, something like that.

THE CHAIRMAN: We will tidy that one up. Finally, 23 - a fine sentiment to wind up on, although there may be some difficulty in defining the appropriate surrounding area.

DR. FORSEY: You will find your major problem, of course, when you get to the last of that "... developed along striking and imaginative lines". One of your major problems may be Mr. Compo and Mr. Assally and other local developers who are full of striking and imaginative ideas for lining their own pockets and may be most happy to oblige on their own terms. You will have some fun controlling them, especially as their pockets include not only the money they get into them but the public officials who help them put it there.

As Charlotte Whitton says, the real question about all the high-rise business in Ottawa is not what the mayor said it was:

who controls the city, the Ontario Municipal Board or the elected representatives? -- it is the much simpler question: who controls the elected representatives? You will really have your fun (I am not being just facetious about this) because these developers set to work to bust the zoning by-law wide open, whereupon the City Council acquiesced, and the thing went to the Municipal Board, and the Municipal Board said in effect: "Look, you johnnies have agreed there is to be a survey of this whole thing by professional consultants to see whether this should be revised. We are not going to permit individual breaches of this by-law until the survey is completed. Otherwise your survey is worthless; you have a survey and merely report on something that is dead, a thing that is decided."

Whereupon there was all this hullabaloo from Compo's office boys in the City Council saying "This is terrible. The City of Ottawa has no self-government at all. The province is lording it over everybody. What is worse, the National Capital Commission is telling the Ontario Municipal Board what to do, because the Ontario Municipal Board accepted the argument of the National Capital Commission on the matter" and this was the National Capital Commission, an appointed body, riding roughshod

over the citizens of Ottawa.

Of course, this is terrible nonsense, but this is one of the things you will certainly run into if you start trying to develop the capital of Canada along what even the three governments regard as striking, imaginative and appropriate lines; you are going to run into parish-pump politics and thinly veiled corruption in the City of Ottawa.

PROF. CONWAY: What progress has been made, Mr. Chairman, with the Government of Quebec about Hull?

MR. STEVENSON: As I mentioned earlier, they are now considering not only the report of the three governments on the future of the capital area, but also the Dorion Report, which was presented to the Government of Quebec last winter, and which I understand contains within it recommendations leading to a regional municipality around Hull. So they should be in a position some time soon to make a general policy announcement about their reaction to the proposal for a tripartite body and their reactions to a proposal of regional government on the Hull side.

PROF. CONWAY: I think the way to get around the problem, Eugene, of the Ottawa operators is to get a real super-operator, such

as the man who built Place Ville-Marie in Montreal, and someone who not only has imagination but also has immense practical experience of slippery people in real estate.

DR. FORSEY: But whatever body you set up, tripartite body, is going to have to have some power to stick, or the local developers will drive a coach-and-four through the whole thing.

THE CHAIRMAN: Well, we will take that one under advisement.

MR. STEVENSON: Do I take it that proposition 20 passed without ----

THE CHAIRMAN: We looked at those three, Don, together.

MR. STEVENSON: Good.

THE CHAIRMAN: That concludes the propositions.

Now, Mr. Robarts is not coming, I am advised, and I am not sure what arrangements he is going to propose as far as his delegation is concerned to the conference in Ottawa in December; but he will be discussing that with us and he may well want some representation from this Committee. I have not been advised finally as to what his wishes are in that regard but we will certainly be in touch as required.

Are there any other matters of business?

MR. PERRY: Do we have any prescribed further meeting?

THE CHAIRMAN: Well, we did advance this meeting from December in order to be in advance of the December meeting in Ottawa. Our task forces will be working. It is rather difficult, until we see what comes out of the December meeting. I wonder if we shouldn't perhaps set aside a date in advance that you might keep open for perhaps January, in case we find the work is accelerating at that pitch.

MR. GREATHED: Third Friday in January?

PROF. MEISEL: Mr. Chairman, the 17th is the third Friday in January. Paul Fox and I are tentatively involved in some other enterprise, and we wondered whether there would likely be a meeting of this group.

THE CHAIRMAN: Again, I think depending on what guidance comes down from the Continuing Committee in the December meeting, we will know whether we are going to need to accelerate the work in sub-committees or whether we are going to have material to come back to look at in plenary. We might keep open, if you say the third Friday is inconvenient in that month, we might keep open the fourth Friday, which is January 24th, without necessarily any commitment to meet then.

PROF. SYMONS: Mr. Chairman, can I just raise a point a propos the coming conference.

It is awfully difficult for our Committee to be useful beyond a certain point if it does not keep fairly in touch with what goes on at a conference of this sort.

I think that if you want a Committee of this sort to give the best advice it can, it is not the best approach to leave the side lines and say: "Well, what did you think about it as you followed it in the Globe & Mail?"; our advice just really is not what it ought to be.

Then moving on from that, if you do what the members of the Committee to attend as observers, I think they are all fairly busy people and they deserve rather more notice of this than they are apparently going to get. I am sorry, I just feel I should say this.

PROF. BRADY: On the question of information, there is a certain amount of documentation, of course, sent out at these conferences usually. Would it be feasible for members of the Committee to get that, or is it difficult?

THE CHAIRMAN: We have not had any that I am aware of. In fact we just last week received the proposed agenda.

PROF. BRADY: I was not referring to the immediate conference, of course, but

with respect to the kind of conference that is going to come in December.

MR. STEVENSON: The Continuing Committee has looked at a draft report which it would propose to present to the conference of Prime Ministers, which obviously has to be updated on the basis of discussions next week. I would imagine that that would be the basic background documentation for the conference itself.

It is a fairly bland document the way it reads so far, somewhat along the lines of our report of what was discussed by that Committee so far. I suppose the guts of any kind of documentation for the internal use of the various delegations will be the actual propositions submitted, and a summary of the discussion on each proposition. I think that is about it, Ian.

THE CHAIRMAN: I think so. We will certainly be making available anything that is available before or after the conference.

PROF. SYMONS: Mr. Chairman, could we not explore other dates if we are shifting from the third Friday?

THE CHAIRMAN: Well, our original timetable, as I recall, when we started out this year involved the third Friday of each quarter, that is to say, March, June, September and December.

Now, I accelerated this meeting for the reasons I described, and I just do not know whether we will need a plenary session in the month of January or February.

PROF. MEISEL: Mr. Chairman, if you do, I am not quite sure but it is quite conceivable Paul and I might be able to switch this other thing. I think it is probably dangerous to start moving the date.

THE CHAIRMAN: Yes. It so happened that when we changed the date and decided to meet in November, there were a number of reasons for setting the date we did, but the next statutory meeting, as it were, would be March 21st.

I think it might be best, however, for our practices, if we kept the two preceding third Fridays open, as we have and if you can; and if we find it necessary to meet in plenary we will try and shoot for those dates.

Well, we will adjourn.

-----The Committee adjourned at 4.30 p.m.

